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# Marvin Wexler

## **Betterment Recovery: A Financial Proposal For Sounder Land Use Planning**

Many commentators have focused attention on the problems and potential of the land use planning process. Others have examined the relative merits of various approaches to public finance. But very few have inquired into the complex connection between the two legal and institutional systems.

Betterment recovery, a process by which the government recaptures value which its planning decisions have created, is a phenomenon which makes that connection. This article is an attempt to fill a vacuum which exists in both thought and practice. It is written with a conviction that the subject is an important one.

Betterment recovery may well be a precondition for the implementation of an intelligent and comprehensive system of land-use planning. That this is so is especially important at a time when a dramatic increase in public intervention in the land market may be necessary to deal with some of our large environmental and social problems. Moreover, betterment recovery would remove many of the inequities associated with the creation of increases in property value by governmental action, while providing the public resources with which to realize more fully the Fifth Amendment's guarantee of compensation for land taken by public condemnation. Betterment recovery thus holds a central place in any scheme of land-use planning that is to be both rational and just.

After a survey of the current law relating to betterment and worsenment in the land market, this article will go on to make the case for betterment recovery in the public arena, examine methods for betterment recovery, and, finally, evaluate the legal and political prospects for its implementation.

## **I Betterment and Worsenment in the Land Market:**

### **Current Law**

An externality arises, in economic theory, when the actions of one party bring costs or benefits to another party, which are not completely borne or enjoyed by the initiating party. In the context of the land market, external costs may be referred to as worsenment and external benefits as betterment.<sup>1</sup>

Betterment and worsenment are commonplace in the land market. On the grand scale, changes in the transportation network can affect the uses and values of land to a large extent,<sup>2</sup> yet such changes in value are rarely internalized to the party who effected the change. On a micro scale, similar effects occur. The behavior and appearance of the residents in a residential area affect the value of the lots in that area. Upkeep (mowing the lawn, repainting, etc.) is only the simplest of illustrations.<sup>3</sup> These costs and benefits are not internalized.

The existence of externalities in the land market is not disturbing in itself. After a period in which the word "externality" elicited the Pavlovian response, "Internalize," perhaps since Coase suggested that it is by no means clear what is an externality of what,<sup>4</sup> people concerned with these problems have taken a more discriminating approach, focusing on the policy implications of each instance of externalization. With this in mind, I turn to a closer analysis of betterment and worsenment in the land market, examining the two phenomena in terms of whether the betterment and worsenment are created by public or private action.

To facilitate the discussion, let me focus on four exemplary factual situations.

### **1 Private Action by A Decreases the Value of B's Land**

A opens a nightclub in a middle-class residential area. The club is not particularly noisy, but it does attract customers from a near-by lower-class residential area. The residents in the area of the nightclub are not comfortable with the life-style of the customers and they have vague fears of robbery, encroachment, etc. Some move out, and the owners in the area find it difficult to fill the vacancies at the same rent. The value of their property has been diminished.

### **2 Public Action Decreases the Value of B's Land**

— An urban renewal development contains, on one side, a power plant. This plant abuts on a residential area. The noise, smell and unsightliness of the power plant decrease the value of the homes in the area.

— B's land is undeveloped and subject to a residential zone which requires lots of at least 30,000 square feet. The zoning ordinance is amended, however, to require a minimum lot area of 100,000 square feet. The effect of the change is to substantially decrease B's chances of selling or using his land. The value of that land has been decreased.

### **3 Private Action by A Increases the Value of B's Land**

A builds a shopping center across the street from B's gas station, on what is presently vacant land. The shopping center is to be served by automobiles, and a large parking lot is part of the plan. As a result of this development, B's business will increase dramatically.

### **4 Public Action Increases the Value of B's Land**

— An urban renewal project, including offices, commercial uses and some luxury apartments, is developed directly adjacent to B's vacant lot. The area used to be a slum. B's land is considerably enhanced in value.

— B's land is vacant and zoned for agricultural uses. B does not now use his land for agricultural purposes because of various market factors. A residential developer approaches B and makes a generous offer, contingent

upon the granting of a zone change from agricultural to residential. B secures the change in zone; his land has been increased in value.

In each of these actions, it appears that A and the government's actions produce costs or benefits which fall on B. Internalization of these costs and benefits would occur if A and the government could recapture the benefits and be made to bear the costs.

An examination of the working of the market and of the legal system will disclose how much internalization presently occurs.

### Compensating Worsement Created by Private Action

A's nightclub is decreasing the value of B's land. Does B have a remedy?

Tort theories of liability offer one solution. Indeed, the facts postulated are from *Reid v. Brodsky*.<sup>5</sup> There, the residents sued the nightclub owner in nuisance, to enjoin the operation of the establishment. The court held that the nightclub constituted an unreasonable use of the land and enjoined its operation.

The vagueness of the contours of nuisance law is admirably illustrated by the *ALI Restatement of the Law, Torts*, 1939, in which the doctrine is summarized in this manner:

The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if,  
a the other has property rights and privileges in respect to the use or enjoyment interfered with; and  
b the invasion is substantial; and  
c the actor's conduct is a legal cause of the invasion; and  
d the invasion is either  
(i) intentional and unreasonable; or  
(ii) unintentional and otherwise actionable under the rules of governing liability for negligent, reckless or ultrahazardous conduct.<sup>6</sup>

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable under the . . . [above] . . . rule, unless the utility of the actor's conduct outweighs the gravity of the harm.<sup>7</sup>

Thus the current doctrinal limits on internalization via a lawsuit in nuisance include the concepts of property rights vested in B, the magnitude of the "invasion" of those rights, proximity, and a cost-benefit analysis of the interests involved.

Calabresi, following Coase, observes that the tort rule of liability does not exist in a vacuum; rather, it has important effects on the possibility and outcome of market solutions:

Regardless of who was initially liable, there would be bribes or transactions bringing about any change in the behavior of any individual that would cause a greater reduction in . . . costs than in pleasure.<sup>8</sup>

However, Calabresi points to transaction costs (the cost of information and the cost of implementation) as a deterrent to a market solution. Thus, the landlord, if he found his tenants moving out, might be able to "bribe" the nightclub owner into closing or into converting it to a more conforming use, but the tenants might have been less successful because of the cost of tenant organization.

Still another remedy, beyond the courts and the market, exists for B. Land use zoning and other police power tools are the classic approach to external cost problems in the land market. Through zoning, the public establishes rules designed to prohibit uses which will have adverse effects on other uses and users. Codes which establish minimum housing standards have the same effect of compelling each user to take into account the effects of its actions on others. In our night club hypothetical, we assume that (through bad zoning planning?) A's use is in conformance with the zoning ordinance. B may have recourse through other police power mechanisms, the noise code or fire code, for examples.

If we assume that because of the temporal priority of B's presence or for some other reason these costs should be internalized to A, then we have seen that the courts and the political process do accomplish this result to a substantial extent. Internalization is not complete, chiefly because of the existence of transaction costs and the failure of the legal doctrine to re-examine its goals, if it can be said to have any, in the light of the existence of these external costs. However, considerable attention is now being given to an effort to rewrite tort law along these lines.<sup>9</sup>

In sum, worsement by private action is a problem which the legal system has addressed; it is not always left lying on what 19th Century jurists termed "the innocent victim" or what a modern-day lawyer *cum* economist might call "the externalitee."

### Compensating Worsement Created by Public Action

B's property has been subjected to a zone which requires a minimum lot size of 100,000 square feet. He is quite unlikely to find a user. Does B have a remedy?

The facts are those of *Aronson v. Town of Sharon*.<sup>10</sup> There, the town argued that the ordinance was a reasonable exercise of the police power, designed to "encourage leaving land in the natural state . . . [so as to afford the

residents of Sharon] amenities . . . fundamental to mental and physical health.”<sup>11</sup> The court felt otherwise, holding that the zone constituted a taking of property which required compensation:

We cannot resist the conclusion that, however worthy the objectives, the . . . [zone] attempts to achieve a result which properly should be the subject of eminent domain. As Mr. Justice Holmes said . . . ‘while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . . This is a question of degree — and therefore cannot be disposed of by general propositions.’<sup>12</sup>

To the extent that eminent domain doctrine recognizes that a taking has occurred, worsement created by public action is compensable and thereby internalized to its creator. Professor Frank Michelman distills four tests for taking from the case law: physical invasion; diminution of value; balancing social gains against private loss; private fault and public benefit.<sup>13</sup>

For now, it is sufficient to recognize that the legal system is quite concerned about the phenomena of worsement created by public action, so much so that it has established compensation as a constitutional requirement, federal as well as state.

#### Recovering Betterment Created by Private Action

A’s shopping center increases the value of B’s land. Can A somehow recover that increase in value for himself?

With regard to a judicial remedy, the common law doctrine of unjust enrichment is germane. As described by Gardner, the idea behind this doctrine is that “one who receives anything of value from another ought to pay for it unless it came to him as a voluntary gift;” Gardner sees this postulate as one of the “four fundamental ideas” of contract law.<sup>14</sup>

Certainly A did not intend a *gift* to B. Also, unjust enrichment doctrine rests not on the existence of an express contract, but on the law of quasi-contract which intervenes in the absence of a promise by the defendant. Since B’s failure to promise is no bar and since A did not intend to give B a gift, one would think that unjust enrichment offered a remedy to A.

However, the scope of unjust enrichment doctrine is carefully circumscribed. Gardner’s reference to “voluntary gift” has been parsed in the Restatement to these words:

A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third parties.<sup>15</sup>

A does not have an action for restitution in the courts.

A would be better advised to pursue a market solution. He might well approach B, before development occurs, with the suggestion that if B will not pay him a portion of the increased value, he will build a competing use (another gas station) in his shopping center, or he will design the development so that the traffic does not encounter B’s station, or he will locate the development elsewhere, where the abutting owners will pay. In this situation, B would retain a portion of the enhanced value as a price for settlement; otherwise, B would have no incentive for bargaining. Another approach A might take would be to buy B out without disclosing to him his plan for development. In this way, A would reap the entire benefit for himself.

The effectiveness of these methods will depend upon the transaction costs which they entail. It is difficult to determine the extent to which such behavior does exist. We do know, however, that straw buyers are a common phenomenon. The Rouse Company’s efforts in connection with their secret accumulation of the land on which Columbia, Maryland, was built is an illustration of the buy-out approach to betterment recovery.<sup>16</sup>

The extent of recovery of betterment created by private action is uncertain; to the extent that it does occur, it occurs in the marketplace.

#### Recovery of Betterment Created by Public Action

B’s land is rezoned and immediately becomes more valuable. C’s land just happens to be located next to an urban renewal project which will attract so many people that C can quite profitably convert his land use from a parking lot to a ten-story garage. Can the public authority which “created” this increased value recapture it?

Although no laws have been designed with the function of betterment recovery in mind, today five areas of the law incidentally accomplish something like this.

### 1 The Property Tax

Theoretically, the increased value of B’s land should be reflected in an increased assessment of its value and an increase in the property tax that B pays to the municipality — a recapture of the increased value. However, this process has severe limitations as a betterment recovery device.

The combination of a relatively low tax (mill) rate and a system of gross underassessment<sup>17</sup> results in an effective property tax rate which ranges from 0.5 percent in Alabama to 2.4 percent in Maine and Massachusetts.<sup>18</sup> Reassessment, the *sine qua non* of betterment recovery through a property tax, is generally believed to be a rather infrequent occurrence.<sup>19</sup> One must conclude that the current property tax represents a very poor betterment recovery device.

Moreover, the property tax is an inherently unsatisfactory betterment recovery device even if its rate were increased and reassessment were frequent. Because it is levied every year, the property tax would (if levied at a substantial rate on land which has been bettered) force some landowners to pay tax on paper increases in values, possibly resulting in a forced sale of the land in order to pay the tax. This illustrates the importance of the concept of realization to betterment recovery.

## 2 The Income and Capital Gains Taxes, State and Federal

When B sells his land, which has been enhanced by a zone change, he will pay capital gains tax on that transaction. Or, if he decides to develop the property himself, the income he derives from the development will be taxed.

Underassessment and reassessment problems do not arise in the administration of the capital gains and income taxes, except in cases of dishonesty. However, the real rate of recovery is almost as partial under these taxes as under the property tax. Other things being equal, the rational receiver of betterment will sell his land so as to incur the capital gains tax and not the income tax. This means that only one-half of the increase in the land value will be taxed. That one-half, meanwhile, will be taxed at a rate from about 20% to 70%.<sup>20</sup> So, in the end, only 10 to 35 percent of the betterment can be recovered. But, because of the existence in the income tax structure of various tax minimization devices which effectively reduce the rate of taxation, the upper stratum of that 10-35 percent continuum is more theoretical than real. Moreover, the stepped-up basis provision for inherited property no doubt allows a good deal of betterment to go untaxed.<sup>21</sup>

At the same time, of course, other sellers of appreciated property who have not been the recipients of such a windfall are being taxed at the same rates. There is no attempt to distinguish between the two types of gains and treat them differently.

In summary, the income and capital gains taxes as presently constituted would appear to be an unfair, inadequate and inefficient means of recovering publicly created betterment.

## 3 Special Assessments

Special assessments are a form of financing local improvements. McQuillan describes them as:

those special and local impositions upon the property improvements, which are necessary to pay for the improvement, and are laid with reference to the special benefit which the property is supposed to have derived therefrom . . . The foundation of the power to lay a special assessment . . . for a local improvement . . . is the benefit which the object of the assessment or tax confers on the owner of the abutting property, or the owners of property in the assessment or special taxation district, which is different from the general benefit which the owners enjoy in common with the other inhabitants or citizens of the municipal corporation . . . Accordingly, it is now well settled . . . that adjacent property may be specially assessed to defray, in whole or in part, the cost of local improvements by which such property is especially benefited. The doctrine . . . is based for its final reason on enhancement of values.<sup>22</sup>

Thus the relation of special assessments to the recovery of publicly created betterment is obvious.

However, limitations today confine special assessment law in a number of important ways.

First, special assessments can be levied only in connection with physical improvements. These assessments are creatures of statute and the authorities agree that these statutes universally limit assessment to this context.<sup>23</sup> Thus special assessments have no application today where public action increases land values other than by physical improvement, for example through a change in zone. This limitation is suggested by the name by which this practice is generally known – “special assessment financing.”

Second, the use of special assessments is narrowly confined even within the area of physical improvements: special assessment financing is limited to financing of *local* improvement:

. . . it is essential that the improvement should be local in character as distinguished from general . . . A local improvement is a public improvement which, although it may incidentally benefit the public at large, is made primarily for the accommodation and convenience of the inhabitants of a particular locality, and which is of such a nature as to confer a special benefit upon the real property adjoining or near the improvement.<sup>24</sup>

What this means is not at all clear. Since special benefit is the heart of special assessment theory, perhaps it means that where there is no special benefit this form of financing is not acceptable. Courts appear to understand this to mean that large-scale public improvements cannot be financed through special assessment.<sup>25</sup> Municipalities have generally limited their use of the practice to such purposes as street improvements and construction, sewer and drain construction, street lighting and waterworks construction, and street sprinkling and cleaning.<sup>26</sup>

Third, it appears that the amount of the assessment is presently quite limited.<sup>27</sup> Statutory limitations which restrict the assessment to from twenty to seventy-five percent of assessed valuation are common.<sup>28</sup> Also, the formula by which the assessment is calculated is universally a cost formula (e.g., ratio of B's land benefited to all land benefited multiplied by the cost of the improvement equals the assessment). Therefore, the assessment will always be no greater than the cost of the improvement, regardless of the size of the betterment the improvement yields.

Fourth, in some jurisdictions statutes limit the property on which special assessments can be levied to that which abuts on the improvement.<sup>29</sup>

In spite of these limitations, special assessment law is the closest thing we presently have to a mechanism for the recovery of publicly created betterment. For this reason, it is worthwhile to inquire more deeply into the theoretical and procedural nature of this tax.

Special assessments are initiated in two ways, by vote of the municipal governing body or by a vote of a majority of the residents in the area to be affected, sometimes followed by a vote of the governing body. Thereafter a special assessment district is created, which raises money through the issuance of bonds, administers the improvement and assesses those who have property in the district. Assessment occurs upon the completion of the improvement. Let us observe what this means in practice.

Eighty owners live on Mansfield Street between Sachem and Division. Fifty of them own cars and desire the street to be repaved. The city government thinks that this project is of very low priority, given other needs and given budgetary constraints. The fifty residents who want the improvement have a free-loader problem: if they pay for the repaving themselves, they would not be able to recover the benefits their action would confer on others. So they resort to the special assessment mechanism, which, in some jurisdictions, without the assent of the municipal government,<sup>30</sup> coerces the dissenting thirty owners into paying for part of the improvement.

This perspective suggests that the special assessment device arose not out of a desire to recover betterment but because private individuals could not get their local government or their neighbors to finance improvements for which they were willing to pay "their share." This perspective also allows some rather fundamental questions to be raised about the legal soundness of this practice, questions with which the undeveloped and uninspiring case law<sup>31</sup> has not come to grips.

First, it is acknowledged that the object of special assessment financing must be public, in order to comply with

the public purpose requirement.<sup>32</sup> Yet how can the improvement be for a public purpose if it must at the same time be a "local improvement?" McQuillan, following the case law, sees no conflict:

A local improvement is a public improvement which, although it may incidentally benefit the public at large, is made primarily for the accommodation and convenience of the inhabitants of a particular locality . . .<sup>33</sup>

Interestingly, this definition is almost identical to the formula used to characterize a zoning ordinance as spot zoning, which is universally held to be unconstitutional as unjustified by police power purposes (the general welfare).<sup>34</sup> The only way to explain this difference is by postulating a different content for the public purpose rule than is used in police power inquiries. But why should it be illegal for a municipality to regulate so as to accomplish x while it is legal for it to spend public funds so as to accomplish x? The question is especially acute in the context of special assessment law, where the thirty Mansfield Street dissenters are certainly being subject to coercive "regulation." Stripped of its doctrinal clothes, the naked question is: why should public funds and public processes be used to make improvements which are private in character?

Second, the rationale of the special assessment, as noted, is benefit received. Yet who decides if a benefit is actually received? As the law stands, the initiators of the assessment (be they citizens or municipal officials or both) and perhaps the courts on appeal make that decision. The "assessee" may object, at hearing and on appeal to the courts, but prevailing doctrine holds that benefit is a matter of legislative determination, reviewable only if arbitrary.<sup>35</sup> Challenging a special assessment is an all but hopeless task.<sup>36</sup>

Thus the thirty residents of Mansfield Street are assessed for the "improvement" without their acknowledgement that they have received a benefit. Yet not only do these hypothetical thirty citizens not own cars, they positively dread cars; they perceive the increase in traffic on the street as a threat to their safety.

The case law appears to recognize this problem only *sub rosa*. On their face, the cases uphold special assessments against challenges that they constitute takings of property without compensation.<sup>37</sup> But in their strict scrutiny of such elements as the boundaries of assessment districts, the formulas used for assessment, and the definition of "local improvement," the case law seems to acknowledge the existence of the difficulty. Of course, this solution further restricts the scope of special assessment application.

Third, special assessment practice gives rise to an interesting equal protection problem. Mansfield Street residents get their street improved, let us hypothesize, while other streets are much more in need of repair. Why, then, don't the residents on those other streets improve their paving

in the same fashion? Because in order to enter the special assessment game the group must be able to pay the assessment. Because assessment must be paid out-of-pocket, while the benefit is realized only upon disposition, only those with ready cash can play. The result is that so-called public improvements go only to those who can afford them.

When required, governmental assent to the creation of a special assessment district acts as a potential corrective to this effect to the extent that the government will seek to protect the interests of dissenters in the assessment group. However, inherent in the use of the special assessment as it now stands is this regressive effect. Courts are only now beginning to be confronted with claims of this kind.<sup>38</sup>

Fourth, under those procedures in which property owners are the sole determinants of special assessment, the process looks very much like a forbidden delegation of eminent domain powers from the municipality to private individuals. The municipality is forced to make the improvement and the dissenters are forced to pay. Indeed, if the cost is high enough and the particular owner is poor enough, that owner might be forced to sell his property.

There is authority in support of the right of an individual or private group to receive a grant of the power of eminent domain, but the case law clearly states that the power can be delegated to a private individual or groups only for a public use.<sup>39</sup> This brings me full circle, to the inquiry of the first legal problem. However, here the use can be justified only under the eminent domain public purpose requirement, not under an arguably more expansive taxing rationale. The most expansive view of the public purpose rule in condemnation case law is the so-called "public advantage" doctrine.<sup>40</sup> Yet even under that view, an "acquisition which is primarily for private benefit is not for a public use."<sup>41</sup> Thus, since the definition of special assessments advanced by McQuillan stresses the primacy of the private interest in the improvement, this type of special assessment fails the public advantage test and would appear to be unconstitutional.

If this discussion sounds too doctrinal, too spiced with legal characterizations, put yourself in the place of the thirty Mansfield Street dissenters. With them, you might say, "There ought to be a law . . ." I suggest that the problems identified are indeed important, raising issues of governmental favoritism (the use of public powers for private purposes), and governmental and economic oppression (the taking of property as payment for unwanted and unrealized benefits).

Two overall problems have been identified in special assessment practice — its limited scope and the unfairness which attends its present use. If those inequities were inherent in special assessment theory it would be wrong to argue that the practice should be expanded. However, I believe that at the root of both difficulties is one conceptual bind: the idea that special assessments are somehow

necessarily or expeditiously linked, politically, temporally and financially, to physical improvements. If, instead, one severed that connection, if improvements were financed out of general revenues and decided upon in the ordinary political process, if assessment were made upon realization and not upon ribbon-cutting, and if we spoke of assessments and not special assessment financing, then perhaps both problems would vanish. More of this below. Today, however, special assessment financing recovers publicly created betterment to a very limited extent, and does so in an unfair manner.

#### 4 Offset of Special Benefit in Condemnation Proceedings

The fourth mechanism currently employed to recapture publicly created betterment is the offset of special benefits to the remainder which occurs in a partial taking situation.

To illustrate, let us assume that one-half of B's large vacant lot was taken by the municipality to use in an urban renewal project. In determining the amount of compensation due to B, the authorities will subtract from the compensation payable on the land taken the value by which the remaining land is "specially" enhanced by the urban renewal project. On the other hand, "general benefits" common to all the property in the area of the project will not be offset.

If this sounds both theoretically and practically confusing, it is. One commentator states:

The underlying reason for the refusal to offset damages by general benefits is that a citizen whose property is taken should not bear more of the cost of the public improvements than other property owners whose property is neither taken nor damaged. The underlying reason for permitting special benefits to offset severance damages has been placed on the equitable principle of preventing unjust enrichment, as well as the simple mathematical fact that one is not "damaged" to the extent that the resultant benefit offsets a taking-caused loss.

The real difficulty is in determining which are "general" benefits . . . and which are "special" benefits. A leading treatise on eminent domain has stated that there is a greater diversity of opinion and more different and inconsistent rules on the question of set-off for benefits than on any other point in the law of expropriations.<sup>42</sup>

Needless to say, little betterment is recovered by a mechanism of such limited application.

#### 5 Subdivision Exactions

Subdivision is the process by which local government supervises the transition of vacant land into developed land. This supervision allows the government to control the layout of development, so as to assure both efficiency



and harmony.<sup>43</sup> Typically, localities require that in the process of subdivision the landowner/subdivider install streets, curbs, storm drains, gutters, sidewalks, water mains and sanitary sewers.<sup>44</sup>

Such subdivision exactions proceed on a cost rationale.

It is clear that localities could just as well both supervise and pay for these improvements. The fact that the subdivider is made to pay is justified in the literature as fair because the subdivider, it is said, is the one who by his development creates costs for the locality.<sup>46</sup>

Some betterment is recovered through this device. However, there is no attempt to relate the recovery to the betterment conferred, nor is bettered land treated differently from land which is not bettered, or, for that matter, from land which might have been worsened in the zoning process.

Moreover, subdivision exactions on residential land raise constitutional questions which a proper betterment scheme would avoid. Especially in its more extreme forms, such as the requirement of dedication of land for school use, the practice of exaction raises the issue of a taking of property.<sup>47</sup> Also, by placing substantial costs on the developer and thereby raising the cost of the housing he is building, subdivision exactions raise many of the constitutional questions now being litigated with respect to so-called exclusionary zoning.<sup>48</sup>

In summary, the current law results in the recapture of very little betterment. The mechanisms which do recapture some of this value were not designed with this function in mind so it should not be surprising that they perform that function in an inadequate, inefficient and unfair manner. On the whole, there exists a vacuum of betterment recovery in the public sector almost as large as that which, at least in terms of non-market solutions, exists in the private sector. This conclusion contrasts sharply with the concern which we saw that the legal system has for worsement compensation, in both the public and the private sectors.

#### **Hypothetical Explanations for the Lack of Symmetry between Worsement Compensation and Betterment Recovery**

What possible explanations are there for the skewed concern of our legal system? Several suggest themselves at this stage of the analysis.

#### **1 Compensation Arguably Engages Society's Predominant Concern for Protection of Private Property; Betterment Recovery Does Not**

When public or private action decreases the value of land, we have a zero-sum game: either property owner B, on the one hand, loses property, or property owner A or the

government, on the other, loses property. When such action increases the value of land, we have a positive-sum game: either B "wins" property and no one loses, or A or the government "win" property and no one loses, or else B and A or B and the government share and no one loses.

Perhaps the law should be more concerned about a situation involving the allocation of property loss than one in which only the allocation of a windfall is at stake. This concern is especially appropriate in a zero-sum situation in which government power is arrayed against a private individual, that is, an arguable taking of property.

#### **2 Betterment Recovery Entails an Incentive Problem**

The lure of profit is the force which makes a market work. Can it be argued that betterment recovery, unlike worsement compensation, would reduce that force significantly?

Certainly much would depend on the recovery mechanism proposed. An owner will only sell his land for development if he can obtain for it more than it is worth to him in its existing use. If for some reason all the extra value is taken away from him he will not be willing to make the land available and the market will break down. Not all recovery schemes will necessarily have this effect; but this problem does limit the type of mechanisms which can be proposed.

The most that can be said at this point is that the incentive problem is one with which any betterment recovery scheme must deal.

#### **3 Worsement May Fall Unevenly, While Betterment May Spread Evenly**

Certainly public action which decreases the value of land does fall unevenly. Such action is sporadic in time and place and may fall very heavily. Given the present political process, it may fall especially heavily on the poor (e.g. urban renewal and highway development). Whether private action which has the same effect is more evenly distributed among the population is difficult to assess.

If private action which increases land values occurred in such a way that those increases were evenly spread, then recovery would be inefficient. Everyone would be as well off without, as with, the recovery effort which itself entails transaction costs. If public action took this same pattern, the effect would be more complex. If public revenues derived from a similarly spread source (i.e., one taxpayer-one dollar), then recovery would change nothing. However, if revenue derived from a progressive source, then recovery would have a regressive effect on the redistribution of income, assuming that the recovered money would be used in place of otherwise collectable revenues.

If worsement did indeed fall unevenly and betterment did spread evenly, it would explain why we compensate worsement but do not recover betterment.

There is little information available which might verify or belie the pattern hypothesized. One might well ask, however, why public action which increases land values should take a less uneven pattern than public action which decreases those values. Both spring from the same sources: zoning, transportation, renewal, and other similar land use decisions.

#### 4 Worsement Compensation May Be More Politically Acceptable Than Betterment Recovery

Worsement Compensation works a transfer of revenue from the taxpayers to the injured party. Betterment recovery would take value from the bettered party and give it to the taxpayer. If every taxpayer had an equal probability of being both worsened and bettered, compensation and recovery would be equally acceptable. However, if the taxpayers and the people likely to be bettered and worsened were different classes of people, then this congruence of interest would not hold. That is, if it were only the left-handed people who owned land, whereas everyone paid taxes, the left-handed people would vote for worsement compensation, but their short-term self-interest appears to oppose betterment recovery.

To the extent that land ownership is concentrated, to that extent political opposition to betterment recovery will be felt. And to the extent that such concentration is congruent with the politically powerful, that opposition will be stiff.

#### 5 The Administrative Costs Involved in Betterment Recovery May Be Larger Than Those Involved in Worsement Compensation

Administrative costs in this context include the cost of measurement of betterment and worsement and the costs of the transfer process. Betterment measurement requires two figures, the value of the land before the public or private action affected it and the value of the land after the benefit was accrued. If the taking is full, compensation measurement requires only the first figure. If the compensation is partial, then both the original value and the value after the partial taking must be known.

However, if we apply the concept of realization to betterment recovery (as we must in order to avoid taxing paper gains), the betterment measurement is a good deal less expensive than the partial taking measure. This is because we might delay recovery and measurement until disposition, either by way of sale or development. If disposition were by sale, then the price would provide a benchmark; if by development, appraisal would be possible, just as is done with reminders in a partial taking. Moreover, betterment measurement would be considerably easier than offset measurement, which requires three figures, including that of betterment.<sup>49</sup>

Two complications make the picture just painted less rosy. First, the delay in time between the creation of betterment and its recovery, which is inherent in the notion of realization, may make more difficult the assessment of the benefit which was occasioned by the public force. In the interval, many market factors may be at work. The most obvious and perhaps easiest to handle is inflation. But there may be several public and private actions influencing the value of B's land between the time zone change and his decision to sell. A measurement of betterment which was designed to separate out these effects might be costly. Second, I have been comparing the costs of betterment measurement to those of partial taking and offset measurement. This comparison is in a sense unfair. Partial takings and takings involving offsets are not regular occurrences, whereas a measure of betterment may be necessary to every betterment recovery. Worsement compensation most often involves full takings, for which the measurement cost is less expensive than betterment measurement.

So far we have been discussing measurement costs. Betterment recovery and worsement compensation also involve administrative costs such as the cost of an appeals process and of the transfer itself. Little work has been done on these costs as they relate to condemnation proceedings. The administrative costs involved in recovering betterment are problematic. It should be remembered that these costs (whatever their weight) also exist in worsement compensation, but they are deemed justifiable. At this point, it is enough to recognize that this is an open question. I shall return to it.

A betterment recovery vacuum exists today. The four most persuasive explanations arising for this vacuum from the preliminary inquiry concern the administrative costs of recovery. The probable political opposition to recovery, the positive sum nature of betterment and the incentive problem. These factors may be said to represent the difficulties of betterment recovery, which any recovery scheme would seek to minimize. I now move on to analysis of the benefits of such action.

## II The Case for Betterment Recovery in the Public Arena

There are six reasons why betterment should be recovered when it is created by public action.

### 1 Betterment Recovery Would Allow for Just Worsement Compensation

As observed, it is a constitutional imperative that worsement created by public action be compensated. This imperative arises from the Fifth Amendment to the United States Constitution (a guarantee which is repeated in the constitution of every State but two):

"... nor shall private property be taken for public use, without just compensation."

The due process clause of the Fourteenth Amendment makes this Fifth Amendment guarantee applicable to the acquisition of property by the states.<sup>50</sup>

The most important concept in the Fifth Amendment for the purposes of the present discussion is "just compensation." Commentators have noted that "... courts have been hesitant to break new ground when dealing with the just compensation phrase ..."<sup>51</sup> The compensation required has long been defined as the cash price that would be agreed on at a voluntary sale between an owner and a buyer both willing but not obligated to sell. So-called incidental losses are not compensated.<sup>52</sup>

The National Cooperative Highway Research Program Report Number 107, "New Approaches to Compensation for Residential Takings," (sponsored by the American Association of State Highway Officials in cooperation with the Federal Highway Administration) is an analysis of eminent domain law as it applies to highway development. The Report, published in 1970, concludes that recent developments "have converged to highlight their [the rules of eminent domain law] inadequacy."<sup>53</sup> As seen by the Report, those developments include the "great increase in land acquisitions at all levels of government,"<sup>54</sup> the critical housing shortage which exists today, and rising public expectations concerning welfare.

If the American Association of State Highway Officials and the Federal Highway Administration believe that compensation is inadequate, can we doubt that it is? The truth is that legal commentators have been saying this for years,<sup>55</sup> and their criticisms of the process go beyond those of the "highwaymen."

— Consider that we measure the value of the taking by looking at the value of the property as if it were on the market. What, we ask, would it bring if the owner wanted to sell? We ignore the fact that the owner does *not* want to sell. There is no compensation for the loss of the subjective values which a home represents. While this same practice holds in other contexts in which damages are determined (i.e. personal value is not awarded), there may be a significant distinction between tort and contract actions between private parties, and condemnation actions in which an individual faces government power. Most obviously, the government is under constitutional compulsion to compensate adequately. Also the very function of private property may point toward a different resolution in conflicts between the individuals on the one hand and between government and a citizen on the other.<sup>56</sup>

— Consider, too, the more objective stakes which a family has in its home and which, although there is some recognition in the law of their existence, go uncompensated. The ability to establish roots in a community is the key to the enjoyment of fundamental rights. Access to education for children, to employment opportunities, to the electoral process, and to the benefits of other public services all depend on residence. The Supreme Court has

often recognized the link between rights in services and residence — for example, *Gomillion v. Lightfoot*,<sup>57</sup> *Edwards v. California*,<sup>58</sup> and *Shapiro v. Thompson*.<sup>59</sup> Perhaps for this reason, housing seems to have occupied a favored position in the case law. See, for example, *Buchanan v. Wharley*,<sup>60</sup> *Shelley v. Kraemer*,<sup>61</sup> and *Reitman v. Mulkey*.<sup>62</sup> But the eminent domain case law does not respond to these interests. These costs are lumped under the doctrinal umbrella of "incidental costs."

This interest in "rootedness" has been recognized by Congress to some extent in the context of compensatory legislation. The relocation requirements of the National Housing Act<sup>63</sup> and the Uniform Relocation Assistance and Lands Acquisition Policies Act of 1970<sup>64</sup> provide some relief, but not nearly enough.<sup>65</sup>

Other, substantial damages are similarly non-compensable. Marc Fried considered the loss "incident" to forced relocation in Boston; he titled his research "Grieving for a Lost Home."<sup>66</sup> As one commentator has stated:

It is certainly not difficult to conclude that the fair market value test creates substantial injustice when the family homestead is being taken and no replacement property is available, or when a black or poor white family has paid off a home in a ghetto and cannot find comparable shelter for the small price they receive for their home.<sup>67</sup>

These substantial, though legally "incidental" damages are not limited to residential takings. As Professor Willis Rokes states:

... these losses can be of major importance to a dispossessed property owner. If he is required to abandon a profitable business, he may incur many types of consequential expenses in relocating it. Contract rights are destroyed, and profits are lost during the moving. It takes time to build up the new business to its former position; meanwhile, competitors move in and take his customers. He may be unable to find a new location because of zoning restrictions, and even if he is successful in his search, the costs of moving his business may cause him great hardship or even financial ruin.<sup>68</sup>

Gimbel's and Macy's don't get condemned. The concern here is for the small businessman who, given the current state of the law, may well have to go to work for Gimbel's or Macy's after condemnation.

— Consider, in a typical condemnation proceeding, the need for an attorney and that under the "going arrangement" the attorney's fee is from one-third to one-half of the amount by which the final award exceeds the last offer.<sup>69</sup> This fact leads to a sad state of affairs, as described by a commentator:

Public officials, including negotiators for condemnors, are well aware of the burden that an attorney's fee places upon the recalcitrant landowner, and it is not at all unusual for them to exploit this obstacle to litigation to force the

landowner to settle out of court. Indeed, recent studies have shown that in many instances the first offer is less than the condemning agency's own appraisal. As reprehensible as this conduct may appear, it is not as deplorable as another practice that is sometimes used. The landowner may be given a firm offer, told that it is a 'take it or leave it' proposition, and notified that it is the agency's intention to deposit *less* than the firm offer in court if the offer is rejected.<sup>70</sup>

— Consider, finally, the narrowness with which the word "taking" has been interpreted:

It is now an almost universally accepted doctrine that . . . when the devotion of land to the use for which it was taken injuriously affects neighboring land, in a manner that would be actionable at common law if the injury had been committed by a private individual without legislative sanction, but does not substantially oust the owner from the possession or deprive him of all beneficial use thereof, the owner of the injured land is not entitled to compensation under the constitution; for merely damaging property does not constitute a taking.<sup>71</sup>

These limitations combine to make the compensation presently dispensed far from full.

This result must be evaluated in light of the central importance of the Fifth Amendment guarantee. Professor Charles Reich's thinking is cogent:

The institution called property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality . . .

. . . while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life. Indeed, in the final analysis the Bill of Rights depends upon the existence of private property. Political rights presuppose that individuals and private groups have the will and the means to act independently. But so long as individuals are motivated by self-interest, their well-being must first be independent. Civil liberties must have a basis in property, or bills of rights will not preserve them.<sup>72</sup>

Former Attorney General Ramsey Clark also has emphasized the importance of the Fifth Amendment: "There is no more vital concept in the Constitution, for it protects the citizen in his property, and freedom cannot exist in a propertyless state."<sup>73</sup> To the extent that government can take private property and compensate inadequately for that taking, independence of the kind Professor Reich and Mr. Clark speak of is undermined.

The legal profession has come to recognize that compensation practices are not just.<sup>74</sup> A short survey of the solutions which have been suggested will reveal the radical nature of the felt need to change.

The highway lobby, in the Program Report cited above, makes the following recommendations: Change the compensation formula to " . . . the highest price that the property could reasonably be expected to bring if exposed for sale in the open market for a reasonable time;"<sup>75</sup> allow additional compensation for certain incidental losses under a statutory scheme which would isolate and value certain major items and under a claims procedure where the actual loss exceeded the statutory valuation; and provide for replacement housing and the reform of the valuation process, including the elimination of bargaining and the institution of full disclosure by the appraiser.

Several commentators have recommended removing eminent domain proceedings from the courts. Indeed, several states have established permanent arbitration tribunals staffed with expert personnel as an alternative to judicial eminent domain proceedings.<sup>76</sup> Moreover, the federal statutes identified above also represent a movement away from the courts in this area, as do certain of the recommendations of the highway people. This movement entails the delegation of the administration, if not the content, of a constitutional right from the courts to the legislature. That thought gives one pause.

Professor Michelman is one of those who favors this kind of solution. He states that the legislature " . . . can impose a useful fairness discipline which eludes the grasp of the courts,"<sup>77</sup> and points to the federal legislation in the area of highway relocation. Michelman points to four institutional limitations which make judicial proceedings inadequate. First, " . . . the over-arching generality . . . of the fairness principle is [such] that it effectively prevents courts from proceeding by the use of categories and presumptions."<sup>78</sup> Yet, is the problem any greater in this area than it is in other areas of constitutional interpretation (e.g., "equal protection")? In fact, the formula submitted by the Project Report is one such set of "categories and presumptions."

Michelman's second point is that the generality of the standard of fairness results in a " . . . loss of effect on the political decision-making process itself."<sup>79</sup> What Michelman seems to mean by this is that today, because compensation decisions are made by the judiciary, the legislature begs off the fairness question when it fashions policy, relying on the courts to pick up the pieces. Yet what evidence do we have that would lead us to the conclusion that if compensation were left in the hands of the legislature the result would be more satisfactory, that the legislature would build full compensation into its policies? Can we trust the policy-makers to weigh and compensate for the costs generated by the policies they make? Is it not against just such an assumption that the Constitution stands?

Michelman also stresses that judges do not have the same access to information that legislators have. This comment implies a rather administrative definition of constitutional rights; this type of argument can be made to justify many encroachments on constitutional liberties. Insofar, however, that it points to the existence of other types of constraints on judicial action, I would agree that such an emphasis is warranted. I will elaborate on this below.

Michelman's last point concerns the inability of courts to fashion settlements. Professor Michelman defines his goal as a "... collective decision making procedure which ... seeks to assure that political bargaining by unreservedly self-interested actors would distribute benefits and burdens 'evenly' or within whatever tolerances fairness admits."<sup>80</sup> If we doubt the "evenness" of the distribution of benefits and burdens produced by logrolling, the judiciary is seen to be more likely than is the legislature to produce fair results. For surely the judiciary is less involved in this "unreservedly self-interested" logrolling process than is the legislature. More importantly, how can the legislature be trusted to maintain the fundamentally important boundary which protects the independence of the citizenry from that same legislature? Michelman's institutional analysis has overlooked the prime institutional difference — the court is the least dangerous branch.<sup>81</sup>

A third, and perhaps the most extreme recommendation is that which follows from Professor Sax's criticism of the eminent domain case law. Sax believes that its muddled state — which he says "... has advanced only slightly since the Supreme Court began to struggle with the problem some eighty years ago"<sup>82</sup> — is explained not by institutional factors but by the absence of a sound economic definition of property rights. His sweeping conceptual remedy, the notion that "public rights may be vindicated without compulsory compensation,"<sup>83</sup> is a testament to the deep unrest of scholars in the field and has profound implications for the practice of compensation by public agencies.

According to Sax, public rights exist whenever "... competing resource-users [land-owners and/or the government] seek ... to make a use that involves some imposition ... on [each other] and those demands are in conflict."<sup>84</sup> The broad scope of these public rights is illustrated by one of Sax's examples:

Assume a situation in which there is, on a long coastline, only a single bay suitable for naval purposes, and the navy wishes to have use of the bay for its ships. Assume, furthermore, that the bay cannot be used for both naval and civilian ships. May a law be constitutionally enacted providing, without compensation, that the bay be closed to all civilian ships? It may, for the bay, being a common, may be allocated to one, rather than another, competing interest.<sup>85</sup>

Such a view of the Fifth Amendment goes a long way toward undermining the function which Professor Reich spoke of. It is part of an on-the-cheap approach to environmental protection which threatens other, at least equally important values.

I want to argue now that these various proposals for solving the eminent domain problem simply will not effect "just compensation." What the courts need to protect Fifth Amendment rights is not instruction in economic theory and the use of legal concepts or directives to employ more generous compensation formulae, but adequate public funds to draw on in administering public compensation.

A large part of the problem with the current "taking" doctrine stems from the fact that courts perceive large economic and political constraints on their actions. The economic constraint exists in the form of limits on the size of the public revenue pie. For while condemnation is isolated in time and space and, therefore, political pressure from property-owners is diffuse, the political consequences of a judicially-increased compensation bill can be intense in their impact upon public policy.

The holding zone is an example. We saw the way one court treated this practice in *Aronson*, in which a minimum lot area requirement of 100,000 square feet was invalidated as a taking of property. Yet while *Aronson* is a sore thumb in the case law, holding zones are common enough in practice.<sup>86</sup> In most cases, the zoning authority is not attempting, as in *Aronson*, to provide recreational land; rather it desires to prevent leapfrogging development and the costs commonly associated with the word "sprawl," or it wants to assure a secure tax base well into the future and therefore considerably overzones for industry or zones exorbitantly large-lot residential, planning to rezone industrial when the appropriate decade comes. Behind this facade are legitimate and important planning objectives. Yet the practice effectively denies to the owner the use of his land. If a court should hold that holding zones constitute a taking of property, the compensation bill would be very large and the likelihood is that it would not be paid. Instead, the zoning authority would have to discontinue its holding zone practice, thereby abandoning some important public policies. Faced with the prospect of non-payment or large and unfortunate policy consequences, the courts avoid these difficulties by calling the public action something other than a "taking of property," or by framing rules which result in less-than-adequate compensation.

Betterment recovery would take the judiciary off the horns of this dilemma. Betterment recovered could be earmarked so that it would be used for compensation purposes, perhaps by means of a trust fund device. In this way, betterment recovery would increase the amount of money available for worsement compensation, thereby loosening the economic and political constraints which presently inhibit judicial movement in this area. It would

enable courts to hold that a taking had in fact occurred and to order "just compensation" without endangering the continuance of the public action in general.

This is not to say that there is some inherent and necessary connection between worsement compensation and betterment recovery. We might, for example, use general revenue funds to accomplish "just compensation." However, we have not done this to date, and the likelihood is that we will not do this. It appears not to be politically viable. Betterment recovery, therefore, is a device for breaking the political logjam; it employs the trust fund theory of public finance: to fund *x*, find a source of revenue which looks sufficiently like *x* so that one can argue that a conduit flowing from that revenue to *x* is only reasonable. Although this kind of reasoning can be pushed to absurd extremes, this does not appear to be the case with respect to betterment recovery and worsement compensation. The former *is* often very practically linked to the latter. One governmental action may occasion both betterment and worsement. Witness the differential impact of a highway on land values, depending on whether the property in question is located adjacent to or in the path of the highway, or several blocks away, or at an interchange. The connection between betterment and worsement exists.

This analysis suggests that hypothetical one, in which I argued that it might be possible to distinguish between worsement compensation and betterment recovery because the former is a zero-sum situation and the latter positive-sum,<sup>87</sup> is misconceived. If the absence of betterment recovery "causes" worsement compensation to be inadequate, then the two are very much linked, and landowner B, whose property is worsened by public action, should be very concerned that landowner C, whose property is enhanced because of public action, not retain that increase in value. Moreover, it has been suggested that betterment recovery has some effect in keeping down market values of land.<sup>88</sup> To the extent that this occurs, whatever basis is chosen for the payment of compensation becomes more viable.

It also suggests that hypothetical four, in which I argued that a concentration of land-ownership would cause political opposition to betterment recovery,<sup>89</sup> may be somewhat overstated. Because betterment recovery will make worsement compensation more adequate, to that extent it serves the interests of the landowning class.

Betterment recovery is not a substitute for reform of the Fifth Amendment case law. However, if the analysis is correct, it is a necessary precondition to such reform. And whatever our notions of institutional behavior and competence are, betterment recovery earmarked for worsement compensation would necessarily make the Fifth Amendment guarantee of "just compensation" more of a reality than it is today.

## 2 Betterment Recovery Would Make Public Decisions Concerning Land Use More Rational

Public intervention in the land market (via zoning, improvements, etc.) must inevitably be distorted by the absence of betterment recovery. Today, the government to some extent compensates people whose land is worsened by its actions and it does not recover the benefits it confers on those whose land is bettered by those actions. This describes the classic situation in which the failure to internalize costs and benefits results in inefficient allocation. Professor Sax describes one of the dynamics in this way:

The prevailing view of compensation law has a considerable practical effect on resource allocation, since the prospect of having to pay compensation is a constraint on government regulation of private property. Though it may be desirable, in terms of maximizing the net product of the aggregate resource base, to undertake a particular restriction on the use of private property, compelled compensation may deter a legislature from enacting the restriction.<sup>90</sup>

To illustrate, take the hypothetical case of a highway decision. The road can be built either in an area in which the compensation bill (under current case law) is high or in an area in which the bill is low. Planning criteria (in terms of an overall plan, social, economic and demographic) point to the former area as the rational choice. However, officials may well decide not to locate the road there because of the larger compensation payment which would be required. If, however, a betterment recovery scheme existed, the bill could be paid, in full, from the compensation trust fund. Moreover, betterment recovery would also allow the decision-makers to consider the now internalized benefits which the road would create.

Thus betterment recovery would lead to better land use decision-making by governments, in that those decisions would be informed by the full weight of the costs and benefits which they would generate.

## 3 Betterment Recovery Would Redress Inequities Which Result from Present Public Land Use Activity

Hypothesize an urban renewal project. On the east, abutting B's vacant lot, is new commercial and office development; on the west, abutting C's residential development, is the power plant. B is allowed to retain the value increment created, but C, because of the limits of eminent domain law, may or may not be compensated for the worsement created. If the renewal plan had reversed the location of the uses, the effect on B and C would have been reversed. In what sense does C, whether restored to his original position or not, "deserve" to be in such a different position from B, who retains his windfall?

Part of this inequity is caused by inadequate compensation to C. Another part is caused by the fact that B is able to retain the betterment conferred on his land, without having earned it. In relation to government action he

has borne no risk in holding the land any greater than the partial loss he might have incurred through inadequate compensation following government condemnation.

Without getting too deeply into a discussion of the philosophy of value, can we not say that when the ordinary citizen perceives that an identifiable governmental action has "created" betterment and worsement, as with B and C, that citizen also perceives that the fairest solution would be for B to give some of his windfall gain to C? The alternative is for the taxpayer to recompense C and for B to retain the gain, which also has come from the taxpayer's pocket. Perhaps because of the limited scale of land use planning in this country today, these arguments are heard from only a small number of land-owners and academicians. This can be traced to the incremental nature of planning — complaints, like interventions, are isolated in time and space.

Betterment recovery would recover a substantial amount of B's windfall gain and give it to C, thereby putting them in more equal positions.

#### 4 Betterment Recovery Would Substantially Decrease Corruption in Public Land Use Decision-Making

Until this point, I have spoken of "land values," now I shall talk about "money." There is a lot of money riding on governmental decisions in the land market. Take zoning decisions, for example:

A good illustration of the impact of zoning can be found in Wayne, New Jersey, 20 miles west of the Lincoln Tunnel. There, the value of an acre of land has risen from about \$700 to as much as \$90,000 as the township's population grew from 12,000 in 1950 to 49,000 in 1970. But the top value of that acre depends on zoning — an acre worth \$90,000 today for high-density use like office building or garden apartments is worth only \$10,000 if it's zoned for one single-family home. "The power to zone is the power to make millionaires," said Lee Edward Koppelman, the director of the Nassau-Suffolk Regional Planning Board.<sup>91</sup>

One way to get a sense of the incentives at work is to look at the lengths to which developers and owners go to obtain rezoning. This is somewhat reflected in the volume of zoning litigation that exists in state courts. For example, of 140 cases decided by the Supreme Court of Connecticut in 1966-67 term, 33, or 24 percent, were zoning decisions. Negligence decisions represented the second largest category; there were 18 such cases.<sup>92</sup>

Although there has been very little research into the phenomenon, it is commonly suggested that developers and owners do more than merely litigate in order to affect these decisions. Surely factors favorable to corruption are present: a highly decentralized decision-making process with a minimum of judicial oversight in terms of scope of

review, a lot of money at stake, and intensely political actors (generally local party officials). Marion Clawson of Resources for the Future states:

No one thinks that planning and zoning actions are free of pressures — individual, group, and political. In some cases, something of tangible value accrues to planning and zoning officials when they act in certain ways. Outright bribery is not unknown but is less prevalent than might be expected in view of the sums involved . . . As long as present zoning methodology continues, suspicion of improper action will persist.<sup>93</sup>

Some idea of the process, but not the scale, of these practices has recently come to light. The New Jersey State Commission on Investigations held public hearings on September 19 and 20, 1972, into the subject of corruption in the zoning process. I will briefly relate one of the stories told to the Commission in order to convey the flavor of the "transaction."

Mr. McDonald wanted to develop a shopping center in Hillsborough, New Jersey. His property was zoned agricultural, so he applied for a change in zone. After making the application, and after the planning commission had decided to recommend approval to the zoning commission (a political body entrusted with the final decision), Mr. McDonald stepped into the office of the Mayor of Hillsborough, Mr. Guerrara, for a chat. I pick up the testimony at that point:

- A . . . I went to Mr. Guerrera, I wanted his guidance as the best way to proceed . . . When I'd go into town, I'd stop into his office . . . I asked him, I said, "John, we've gone this far. Now, what's it going to take to get this project completed?" He told me it was — first of all, he said he'd have to talk to the boys.
- Q Talk to the boys?
- A Yes, sir.
- Q Did he identify "the boys?"
- A No, sir, he did not.
- Q Did he say what he had to talk to the boys about?
- A No, sir, he didn't . . .
- Q Well, what was your purpose in going to his office, sir?
- A Well, I'd stop by just to find out how things were progressing and if we had any problems. If I had a problem I would tell him about it. Like I found out that if we got twenty per cent of the neighbors would object, then we would need two-thirds majority of the council's vote . . . When I come back to him again after he talked to the boys, he told me that the project was probably going to take five big ones.
- Q Five big ones?
- A Yes, sir.
- Q Do you know what he meant by that?
- A Yes, sir, it was very clear. \$5,000.
- Q Well, what was your reply to Mr. Guerrera at this time?
- A I was a little bit befuddled at this point. I don't think I replied to him at all immediately, and then I told him, I says, "Are we talking about \$5,000?" He said, "Yes." And that's when the cat was out of the bag, so to speak.<sup>94</sup>

One cannot know how much under-the-table betterment “recovery” does take place. One could, however, substantially reduce the incentive for corruption by making the recovery public and removing much of the windfall — in other words, by recovering betterment.

##### 5 **Betterment Recovery Is a Necessary Precondition for Large-Scale Public Initiative in the Land Market**

Many authorities believe that public intervention in the land market must be increased dramatically if we are to cope with many of our large environmental and social problems.<sup>95</sup> Given the current legal framework, specifically the absence of betterment recovery, this development is unlikely to occur. The more public intervention there is in the land market, the more worsment and betterment is created. The more worsment and betterment there is, the more acute the problems of inadequate compensation, inequity, planning distortion, and corruption become. The political process is quite unlikely to sanction a movement which has these consequences.

Perhaps this dynamic is one of the reasons why this country has not moved with greater alacrity towards land use planning. As will be discussed, one of the first steps which the British took when, just after World War Two, they decided to implement comprehensive land use planning, was to adopt a betterment recovery scheme.

##### 6 **Betterment Recovery May Serve as a Source of General-Purpose Revenue**

It has already been suggested that betterment recovery is a source of revenue for the purpose of worsment compensation.

Betterment recovery might exceed worsment compensation and thereby be freed for other use if one of two conditions applied. First, the government might recover both publicly and privately created betterment. Second, publicly created betterment itself might be much larger than publicly created worsment, so much so that its substantial recovery would leave a surplus in the fund after compensation had been made. Although there is little empirical evidence on this last point, one might speculate that, overall, public intervention raises land values to a considerable extent. If we assume that most land is held by the politically powerful, this may be the result of political factors. Or, in a more generous sense of “political,” we might say that the political process intervenes to better the general welfare and succeeds much more often than not.

For present purposes it suffices to say, with Professor Self, that “. . . at least it is reasonable to argue that the State ought not to make an actual loss”<sup>96</sup> out of its activities in the land market. Yet that is the situation today, in which compensation is paid (although inadequately) for costs inflicted but the benefits conferred are not recovered.

Betterment recovery would allow compensation to become just; it would make public land-use decisions more rational; it would redress inequities which are caused by its absence; it would substantially decrease corruption in the public land-use decision-making process; it would make it possible for officials to contemplate comprehensive land-use schemes; it would offset revenues currently used for purposes of compensation and might serve as an additional source of general-purpose revenue. For these reasons, betterment, at least when created by public action, should be recaptured.

### III **The Extent and Methods of Betterment Recovery**

Given the conclusion that the public should recapture the betterment it creates, two questions arise. Do we also want the public to recapture betterment which is arguably created by private parties in the land market? How should recovery, of whatever scope, be achieved so as to minimize the costs of the process?<sup>97</sup> With respect to this second question, there are two primary modes of recovering betterment. One is to tax the betterment once created. The other is to build into the process of betterment creation devices for immediately recapturing betterment for the public. This latter technique can only be used where betterment is created by discrete institutional acts onto which these recapture devices can be grafted in advance — that is by actions of public agencies.

Thus there are three major choices of betterment recovery devices available: the recovery of all betterment via a tax device; recovery of only publicly created betterment via a tax device; recovery of only publicly created betterment by means of a variety of discrete mechanisms.

#### A **Public Recovery of All Betterment by Means of a Tax**

The case for public recovery of all value increments is commonly associated with Henry George.<sup>98</sup> Although George’s ideas went considerably beyond notions of betterment recovery, one of his ideas is central to this argument: that there can be no distinction between publicly and privately created betterment. In a sense foreshadowing Coase, George thought that one could not say that A’s shopping center “improved” B’s gas station; rather, the increase in value associated with that development has been created by a complex of factors, public and private. George identified this complex as “society.”

The ideological and ethical nature of this argument is obvious in George’s writing. That tone is reflected in the most recent of the many revivals of Georgist thinking, the dissenting opinion in the National Commission on Urban Problems (Douglas Commission) on the subject of taxation of land values:

The statistics [concerning land values in Pittsburgh] . . . are the clincher . . . whereas bare land values amounted to \$269 billion in 1956, they had amounted by 1966 to \$523 billion. This meant that they had virtually doubled in 10



years, and had experienced average yearly increase of \$25 billion . . . Other reliable sources show land values rising even faster in some States such as California.

The owners of the land received these enormous gains without strain or effort on their part. They owned a relatively scarce and limited asset which acquired more and more value as population grew and as the gross national product increased. The progress of society created these values; the owners of the land received them.<sup>99</sup>

A convincing refutation of this notion of publicly-created value has not appeared.<sup>100</sup> As the dissenters stated:

Such a discussion is now muted for a variety of reasons. When the issue is raised, the cynics commonly dismiss it by saying, "Oh, that is the single tax" or "that is Henry George," as though by labeling the proposal they had somehow refuted or disposed of it.<sup>101</sup>

A few observations can be made, however.

First, neither the advocates nor the critics of universal land increment recovery (or taxation) ever really analyze their first assumption, that there is no real distinction between publicly created betterment and privately created betterment. They speak only of "increment." I will attempt to show that there are important distinctions between the two, which relate to the impact and goals of a betterment recovery program.

Second, the proposal to recover all value increments would probably face stiff political opposition. Privately created betterment is surely a more widespread phenomenon than publicly created betterment. Land-owners will no doubt object that they would be seriously damaged by such a recapture. Since recapture of only publicly created betterment is a more marginal change, it should encounter less opposition.

Third, some universal land tax advocates have argued that such a scheme would do everything from eliminating slums to stopping urban sprawl. As observed, these arguments have been used as straw men by opponents of universal recovery. A cogent response must take on the more rational claims of the Douglas dissenters: "What we advocate is much more modest, namely that within a general system of taxation a special effort should be made for society to recapture for itself an appreciable share of the values which it has created,"<sup>102</sup> where "it" refers to what I have termed both publicly and privately created betterment. Specifically, the dissenters recommended a 40 per cent tax on the increase in all land values, to be levied upon every transfer of land.<sup>103</sup>

The question remains: should a betterment recovery device recapture all value increment or only that increment "created" by public action? More basically, is there a difference between the two? There are two arguments for the proposition that there are important distinctions between "publicly-created" betterment and "privately-created" betterment.

## 1 The Recapture of All Betterment May Entail a More Serious Incentive Problem than Would the Recapture of Only Publicly Created Betterment

As noted, any betterment recovery scheme involves an incentive problem. Universal betterment recovery would entail a larger problem of this type than would recovery only of publicly created betterment, for two reasons. First, a universal recovery would apply to all transactions in the land market; a recovery mechanism limited to publicly created betterment would apply to a relatively small number of transactions, i.e., those involving governmental action. (However, it is possible to argue that the incentive difficulty here can be better overcome by varying the tax rate, rather than by altering the incidence of the tax itself.) Second, there are factors which may, in individual cases, make the disincentive from betterment recovery less of a problem with respect to publicly-created betterment than privately-created betterment.

The disincentive problem with recovery of privately created betterment can be illustrated by returning to an earlier hypothetical. A's shopping center would increase the value of B's land. I suggested above that A may well be able to "bribe" B to pay A in part for that increase in value. Or, A may be able to buy B out and recover the full amount of the betterment. To the extent that this occurs, A is able to internalize the benefits "he creates." We do not know the extent of this internalization. Universal betterment recovery would affect both A, the initiator of the development, and B, to the extent that A can internalize the value increment.

In the case of publicly created betterment, it is generally the government which is the initiator. Yet any disincentive to the government which operates via the mechanism of recovering publicly-created betterment from those economic interest-groups that had lobbied for the public action, is offset by a new factor: that any such recovery will simultaneously serve to lubricate public action, by acting as a budgetary counterweight to the compensation load.

For these reasons, limiting betterment recovery to the recovery of publicly created betterment may well reduce the incentive problem.

## 2 Privately Created Betterment May Spread Evenly, while Publicly Created Betterment May Not, thus Justifying Recovery only of the Latter

I hypothesized above from the analogy of public worsement, that publicly created betterment falls unevenly.<sup>104</sup> If this is correct, and if privately created betterment fell evenly, then only the recovery of publicly created betterment would be efficient, except with respect to the redistributional consequences which would occur if the revenue source were skewed.

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How ought one to begin to answer the question whether private betterment falls evenly or not? Such betterment occurs when private enterprise enhances land values. Private enterprise follows the market, which itself follows money. Can one deduce from this that privately created betterment generally accrues to the well-off, therefore falling unequally? Or might we begin on a more micro-economic level, focusing on the behavior of individuals as home-dwellers, and reason that over a lifetime one is probably going to benefit as much as one benefits others? Would the latter assumption result in spreading or would that depend on the relative level of entrepreneurial activity of the various classes in the market? Or can we simply say that since most property belongs to the affluent (even that partially held, e.g. leased, by the less affluent), privately created betterment will fall unevenly?

In the absence of empirical information, all this is rather speculative. However, one obviously relevant difference between privately created betterment and publicly created betterment is that the transactions which create the latter are relatively isolated in time and place, i.e. there are far fewer government interventions in the land market than there are private dealings. This would suggest that even considered as a random process, public betterment is less likely to be evenly spread.

These considerations — the incentive problem, and the possibly differing patterns of incidence of publicly and privately created betterment — together with the matter of political feasibility, stand in the way of the universal tax approach to betterment recovery.

On the other hand, there exist two factors which might be said to constitute the special benefits of a universal betterment tax mechanism. Universal recovery obviates the need to distinguish in some fashion between publicly and privately created betterment. This will considerably lower the administrative costs involved in recapture. And, given a particular tax rate, universal recovery recovers more betterment, that is more money for public use, than would recovery only of publicly created betterment.

#### **B Public Recovery of Publicly Created Betterment by Means of a Tax**

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If we should decide to recapture only publicly created betterment, we could do so by applying a new tax to profit realized from transactions in publicly bettered land. The British have had considerable practical experience with just this type of device, which they have termed a betterment levy. The levy has undergone many changes since its institution in 1947; examination of its history will be instructive.

#### **The 1947 Act**

Shortly after World War Two, the British embarked on a comprehensive scheme of land use control and planning. As a part of that scheme, Parliament established a system

of compensation dispensation and betterment recovery.<sup>105</sup> The Act of 1947 was the creation of a Labour Government.

The Act nationalized future development rights in land. That is, the current owner thereafter owned the land only in its current use; rights in the land with respect to future uses belonged to the State. A once-for-all compensation package of 300 million pounds sterling was paid to land owners for this “taking” of future rights. The Act also imposed a 100 per cent betterment tax which was payable to the State when the current use was changed, pursuant to planning permission (somewhat analogous to a zone change) to a more valuable use.

Thus the 1947 Act theoretically created a mechanism which would fully recapture betterment created by the public granting of planning permission. However, unforeseen problems undermined this expectation.

The 100 per cent recovery created a large incentive problem. By removing the owner’s right to anything more than the existing use value of his land, the Act left the owner with no incentive (except to realize its present value) to part with his land. The result was that a large amount of land was taken off the market.<sup>106</sup> Also, under the 1947 Act, betterment was recovered by the government at the time it granted planning permission to the private party. This caused two difficulties. First, the increase in land value was an expected change, not an actual change. Because of this, the amount of the tax was criticized as arbitrary.<sup>107</sup> Second, although land value increments are created by other public action beside planning permission, the 1947 Act made no provision for recovery in these situations.

#### **The 1952 and 1959 Acts**

The distinctive and apparently arbitrary nature of the betterment tax was sufficiently unpopular to make it a campaign issue in the national Parliamentary elections of 1951. Shortly after gaining a parliamentary majority that year, the new Conservative Government abolished the betterment tax. The result was the continuation of worsement compensation without the recovery of betterment. Inequities and distortions of the kind noted above are thought to have marked this period of British land use planning (1952-1959).<sup>108</sup>

Those inequities culminated, in the public eye at least, in the suicide of Mr. Pilgrim. Mr. Pilgrim owned land for which he had in the recent past been able to secure planning permission. Then the government informed him that his land was now needed for governmental purposes and that it would be acquired by compulsory purchase (the English equivalent to condemnation). On the open market, Mr. Pilgrim’s land was worth its existing use value plus its development value with respect to the use for which permission was granted. In a compulsory purchase proceeding, however, it was worth only its existing use value. In Mr. Pilgrim’s case, those two figures were very far apart, and Mr. Pilgrim, who was far from a large land-

holder, had relied on the open market value. Finding himself unable to get anything near what he had expected to realize from his land and in a very tight situation, Mr. Pilgrim decided to avoid further exposure to the slings and arrows of outrageous fortune. His suicide created a public outcry against the 1952 legislation.

The Conservative Government responded by passing the Town and Country Planning Act of 1959. It changed the compulsory purchase formula to equal existing use value plus a hypothetical development value. The result seems to have been the lessening of land use planning, in order to lessen the compensation bill.

### The Land Commission

When the Labour Party returned to power in 1964, their program included the reinstatement of a betterment tax, to be administered by a Land Commission. This became law shortly thereafter. The Land Commission was given two jobs, to acquire land (compulsorily and not) and to administer the betterment tax. Worsement compensation and betterment recovery were linked.

The betterment tax administered by the Land Commission was the most sophisticated to date. It was charged only to land which had been granted planning permission and only then when development value was realized. Realization was defined by six categories, the most important of which were sale, rental, and the commencement of material development. The rate of the tax was not specified in the Act, but it started at 40 per cent and was later moved to 50 and 55 per cent. Appreciation due to factors other than the granting of planning permission was not to be taken into account in determining the tax. Betterment was calculated by the following formula:

$$\begin{aligned} \text{Betterment Tax} &= 40\% \text{ Net Development Value (NDV)} \\ \text{NDV} &= \text{Market Value Base Value} - \text{Expenditures on} \\ &\quad \text{Improvements and Ancillary Rights} \\ \text{Base Value} &= \text{the purchase price at the last sale,} \\ &\quad \text{or} \\ \text{Base Value} &+ \frac{11}{10} \text{ current use value} + \text{severance depreciation,} \\ &\quad \text{(whichever is higher)} \end{aligned}$$

Payment of the betterment tax exempted the land from capital gains taxation. The other half of the Land Commission's work was land banking. Those acquisitions made compulsorily were to be purchased at a price equal to the market value minus the betterment tax collectable.

Although, or perhaps because, this betterment tax was quite sophisticated, problems did arise. Land was again withheld from the market to a notable degree. Observers are unsure whether this was a result of the tax level, public misunderstanding of the complex administrative formula, or the expectation of those owners — and many observers focus on this point — that the Tories, when they returned to power, would abolish the tax.

On the whole, however, one might hazard the conclusion that the Land Commission mechanism did put British land use planning on a structurally sound basis: the Labour years of 1964 to 1969 were the heyday of British planning. This experience confirms to some extent several of the arguments made for betterment recovery, although the precise relationships await discovery by detailed research.

A second tentative conclusion which can be drawn from the British experience with the betterment tax concerns the political viability of a tax approach to betterment recovery. The Conservative Party has consistently opposed the betterment tax, and that opposition has compromised the tax's effectiveness. It is unclear whether this opposition is a result of the relative merits of the tax as a device for betterment recovery or whether it focuses on the question of recapture itself. The contrast between the political distress of the betterment levy and the political success of a second, non-tax betterment recovery device used in Britain, would appear to suggest that the opposition is not to the recovery itself.<sup>109</sup> Instead, perhaps these differences in acceptability can be explained in terms of the varying administrative costs of the two devices: Any recovery mechanism which, like a tax, requires a definition of betterment, will be costly.

However, it is more likely that this differential acceptability can be traced to the inherent limitations on the applicability of the recoupment mechanism.<sup>110</sup>

### C Public Recovery of Publicly Created Betterment by More Disaggregated Means

We have identified two large impediments to the establishment of betterment recovery — the possibility of significant administrative costs and political opposition. The first is more of a problem with respect to taxation of only publicly created betterment; the second would appear to be more forceful with respect to the universal tax. It may be that these obstacles can be diminished by adopting a much less unitary approach to betterment recovery. That is, if we focus on the governmental actions which actually "create" betterment, perhaps then we can restructure those actions, in minor but important ways. In this way, we might fashion betterment recovery mechanisms which do not raise administrative costs above their present levels, and we may also be able actually to create political *incentives* for the "establishment" of betterment recovery.

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In keeping with this disaggregated approach, I shall focus separately on the two types of governmental action which "create" betterment, the active intervention of public improvement and the use of the zoning power.

#### 1 Public Improvements

Examples of public improvements which increase land values are legion. Some of the most obvious are road and mass transit construction and urban renewal. I will suggest three mechanisms or models by which the public can

recapture the betterment which results from this type of intervention: recoupment, use density, and reformed special assessment.

a *The Recoupment Model*

Recoupment refers to the practice of public land acquisition, public development of that land, and the retention by the public of the profits which accrue when the land is sold or leased by the public. It is a mechanism to achieve public control at critical points where land development will occur and where large amounts of betterment will result. Recoupment practices have been alive and well in Britain for several decades, enjoying bipartisan political support.

The outstanding illustration of the process is New Town development. In Britain, New Towns are decided upon by the national government, in consultation with local governments. The actual development is entrusted to public development corporations, one for each Town. The corporation has the authority to acquire land compulsorily within the area designated by Parliament as the New Town, and it undertakes most of the development (including roads, housing, factory shells, shops, and other facilities). Compulsory purchase is made at the market value of the land assuming that there were no New Town being developed, necessarily a somewhat speculative price. Since the majority of New Towns are developed almost from scratch, this amounts to agricultural value, generally very low.

On this land, the corporation makes public improvements designed to make the land attractive to residents and business. When investment occurs (the New Towns have been very successful in this respect), the land value of the Town increases substantially. This value increment is recaptured by the public corporation through industrial and commercial leases. The money taken in this fashion is generally sufficient to pay for the improvements made by the corporation, to cover administrative costs, to subsidize low-cost housing for working-class residents, and to leave a tidy surplus.

The scheme has proved so successful as to create a debate as to how this public surplus should be used. Should it go toward more public improvements in the New Town, be distributed among the New Town residents, or be recaptured by the national government? Professor Self has suggested splitting the money between the national taxpayer (to encourage the building of New Towns) and the New Town resident (to finance local services).<sup>111</sup>

New Town development certainly is a dramatic illustration of the recoupment idea. How widely this mechanism is used on a more local level or what the Land Commission has done with it I do not know. Certainly the principle is not limited to a New Town context.

Recoupment has been referred to in the bulk of the American literature as "excess condemnation." Writing in 1917, Mr. Robert Cushman stated that "... in no American city has there been any experience of any real importance with the policy of excess condemnation as a means of financing public improvements."<sup>112</sup> Writers since Cushman have commented on the constitutional obstacle to such a scheme.<sup>113</sup> They have not documented instances in which recoupment has been used in this country.

Cities in other nations have made considerable use of this model. Cushman's examination of the application of the model in Europe and Canada in the years before 1917 leads him to the conclusion that the risks of such public enterprise are large. He numbered among these risks the difficulty of predicting an increment and the amount of that increment, the uncertainty of finding a buyer, the certainty of heavy initial outlay of public funds for condemnation costs, the certainty of a loss of tax revenue, the possibility of a general depression in land values, and the possibility of inefficient administration by local officials.

These considerations suggest that "excess condemnation" is an appropriate betterment recovery mechanism in only a limited number of situations. It should be considered only when a public improvement is relatively certain to increase land values, when that value increment is confined to rather small area of land (so as to limit the condemnation required), and when the real estate market is relatively strong. It would be advisable to use this technique in situations in which the number of persons to be compensated is small and the value of the land to be taken is low (e.g. presently undeveloped land). This will keep the condemnation and administration costs down, ensure a minimal tax loss, and disturb a minimum of property owners (condemnation and lease-back may further reduce the burden on owners). These limitations on the scope of excess condemnation practice are entirely in accord with the limitation on the practice imposed by the practical fact that each use of it will require a substantial amount of scarce public funds.

The excess condemnation mechanism would seem to be appropriate for large-scale transportation development, highways and mass transit in particular. In the planning stages of such developments, one could pinpoint areas, such as access points and interchanges, at which substantial betterment would no doubt accrue. Many of these areas will be undeveloped at that point in time, others will be underdeveloped. Inner-city urban renewal, in contrast, may well represent a situation in which excess condemnation is not a good idea. It should be remembered that one of the justifications for betterment recovery is to make worsement compensation adequate. The more condemnation that is required to accomplish this, the more circular the argument becomes. Of course, New Town development on presently undeveloped land represents the situation most appropriate for excess condemnation.

**b The Use Density Model**

When the government builds a highway, it creates access. Access is a very valuable commodity; indeed, access is the *raison d'être* of the city.

We are unaccustomed to viewing a highway toll as a reflection of an increase in the value of the land taken for the road; it is more commonly associated with the concrete poured over that land. We are similarly unaccustomed to thinking of that highway as valuable space which might be devoted to profitable use besides its use as a transportation corridor. These new perceptions of land taken for public improvements constitute the basis for the use density model.

To illustrate, land taken for highway purposes is currently used in almost every instance for that one purpose only. However, it is possible to use that land and the air rights over it for other uses. Residential and office space can be accommodated above transportation space.<sup>114</sup> This additional use could be constructed and owned or leased by the public, who would thus enjoy the increase in value created by the access which the highway provides. Or the public might auction off the rights to contract and own the supplemental use.

The use density model does not have many of the theoretical or practical limitations which confine the usefulness of excess condemnation. Rather, the most significant limits on its application are those on the governmental imagination.

**c The Special Assessment Model**

The outline of special assessment law as it exists today has been sketched and its limitations and legal difficulties examined. Clearly, special assessment law must be reformed if it is to serve as a fair and efficient mechanism for betterment recovery. We would need, for example, to remove the (in places, statutory) limitation which allows only land abutting the improvement to be assessed. We would need to assess at the time of realization, not at the time of the construction or completion of the improvement. Very importantly, we would have to amend the doctrine which confines assessments to so-called local improvements while retaining the notion that special benefit still is the basis for assessment. We would need to remove the possibility of assessment by purely private initiative.

One might also suggest that we begin to assess owners on the basis of benefit received and not cost of improvement. I believe, however, that this is one limit that should be retained. Any change in the assessment measure which is made in the name of more precise recovery of betterment must encounter the difficult task of measuring that betterment. I have shown the complexities which the British attempt involved. Moreover, because of the incentive problem, recovery cannot be in full; therefore any precise measurement of betterment will have to be multiplied by some rather arbitrary percentage (40 to 55 in Britain).

If we retain a cost calculus, what we lose in betterment recovery in this way we might very well make up in lower administrative costs which the concrete improvement cost figure enables us to achieve. For these reasons, and because of the desire to minimize the number of changes — especially those which would have to be sought in the legislature — in current practice, I suggest the retention of the cost formula.

The enhanced scope of special assessment application may, however, change somewhat the composition of that cost. Present law allows “expense incidental to the improvement,” including compensation made by the public authority for land taken for the improvements, to be included in the assessment.<sup>115</sup> Since, under the present practice, the types of improvement for which assessment is permitted are very small-scale, condemnation costs are quite low. When and if assessments can be used in connection with urban renewal and other major physical interventions, those costs will be substantial.

The key to current assessment practice is the drawing of the assessment district and the application of the cost formula. Reforming assessment would mean changing these processes. First, because assessment would occur upon realization (the British system is an illustration), we would have a better indication whether or not there really was a benefit conferred. I suggest that if realization indicates that no benefit has been received (for instance, if the sale price three years after the improvement is lower than was the previous sales price two years before the improvement; or if the current price is higher, but only by the amount of inflation over that period), then no assessment should be made. This would make the drawing of the district lines less crucial than under the present practice, which makes assessment follow automatically from inclusion within the assessment district. However, because we are expanding the application of assessment beyond abutting owners it becomes increasingly important that the assessment formula allocate the cost according to the spread of benefits. One approach might be to draw concentric circles around a renewal project and have the owners in the inner circles pay a greater proportion of the cost than owners in the outer circles.<sup>116</sup>

**2 Zone Changes**

The other public intervention in the land market which creates substantial betterment is zone decisions. Two recovery mechanisms are appropriate for this situation: conditional zoning and zone auctions.

**a The Conditional Zoning Model**

“Conditional zoning” is a term of art used to describe a zoning ordinance which permits a use of property in a zoning district subject to restrictions other than those applicable to all land similarly classified. The mechanism is used today to bring some amount of flexibility to the otherwise rigid zoning process. This need is felt to be particularly important in the case of a boundary line between

two different use districts. Any change in zone for property on that boundary line will effectively redraw the line and possibly cause damage to the property in the more restricted use district which forms the new boundary line. Conditional zoning is a way of showing concern for the impact on that boundary property. Typical conditions imposed include restricting buildings to a small area of the rezoned land and requiring fencing and landscaping of a particular kind on that land.

Put simply, the proposal advanced here is to use the zone change, which itself is the event which “produces” betterment, as the vehicle for recovering that benefit in kind through the imposition of conditions which would benefit the public.

Let me illustrate. B owns land now zoned agricultural. He applies for a zone change so that he may build a large housing development. A change in zone will clearly increase the value of B’s land, although by how much is not known. The municipality might grant the zone change subject to the condition that the housing built on the land be at least 20 per cent subsidized housing. Or it might demand that B dedicate a portion of his land for school or park sites.

As in the cases of the recoupment and reformed special assessment mechanisms, there is no need in this scheme to calculate the exact amount of betterment created. What would be required is the assurance that the recovery did not exceed the benefit conferred. Indeed, in order to cope with the incentive problem, we would probably want to make sure that recovery was less than the benefit. There would, of course, be administrative costs involved in this determination although their extent is difficult to determine.

One advantage to such recovery in kind is the flexibility allowed the public in its choice of ‘payment.’ Besides requiring of residential builders that parks (perhaps of the vest-pocket variety) and school sites be set aside, the municipality might require an industrial user to meet stiff pollution standards, or it might feel that a park was equally, perhaps more, appropriate in industrial space. Any potential user could be required to meet higher and more expensive architectural standards. As with the use density concept, one’s imagination would appear to set the limits.

On the other hand, there would be no cash payment to the municipality with which the public would offset worsened compensation. Nonetheless, to the extent that the dedication of land by condition offsets the need for condemnation elsewhere, there would as in the case of monetary recovery, be an offset effect.

There are two current municipal practices related to the conditional zoning model. The first is subdivision exaction. In this scheme, subdivision approval is conditioned upon the owner, assuming such burdens as street lay-out and construction. Some recent case law has moved be-

yond such a limited exaction to legitimize demands like land dedication for schools and parks.<sup>117</sup> But a subdivision exaction is based on a cost, not a benefit rationale; it is a device attempting to impose on owners those costs which their development “create” for the community. Although the result may happen to be the same in some cases, in most cases very different results would flow from the use of cost and betterment mechanisms. For example, the imposition of costs would no doubt be passed on to the consumer, whereas the recovery of wind-fall profit ought not substantially to affect the cost to the consumer.<sup>118</sup> This difference may be sufficient to determine who occupies the housing.<sup>119</sup>

A second variation of the conditional zoning proposal, known as “incentive zoning,” is now coming into use, in, for example, San Francisco, New York and Chicago.<sup>120</sup> Typically, this practice involves the granting of a higher floor-to-area ratio than that normally allowed in the zoning district to an owner in return for some consideration. In New York, this practice has been used in the Theatre District and the consideration exacted is the establishment of a theatre in the building.<sup>121</sup> In San Francisco, ratio increases are awarded for parking space accommodation, sidewalk widening, provision of public plaza, and provision of a public observation deck on the top of the building, among others.<sup>122</sup> In Chicago, a somewhat similar mechanism has been used to preserve landmark structures.<sup>123</sup> These uses of incentive zoning are limited forms of betterment recovery. They only place conditions on a change in the floor-to-area ratio, not on a change in the underlying zone. Yet these devices do point the way toward larger-scale efforts, as embodied in the suggested model.

#### b *The Auction Model*

Mr. Marion Clawson has suggested selling zone changes.<sup>124</sup> He envisions the process as an:

open, competitive sale of zoning and rezoning of some tract of (say) 20 to 100 acres within a mile square or some other similar area. Conditions to be met by the buyer should be specified and made part of the contract (and later enforced). Owners of land or options on land would bid cash sums for the rezoning classification. While the zoning authority should retain the right to reject any and all bids, normally the reclassification would be awarded to the highest bidder.<sup>125</sup>

The auction model is widely used by the federal government with regard to timber and mineral leases. Clawson states that it is responsible for receipts of over \$1.25 billion in the past fifteen years in mineral leases for submerged lands off the seacoast.<sup>126</sup>

Clawson's suggestions is not unprecedented. Professor Self characterizes the 1947 British betterment tax in similar terms:

This charge was meant to be not a tax but a sale by the State of the value of planning permission, and the original idea was that it should be assessed according to 'commercial considerations tempered by the public interest.'<sup>127</sup>

In Clawson's scheme the government acts as little more than auctioneer.

The utility of this solution hinges on how much faith one has in the land use planning process, as compared with a free market, to make the most desirable land use decision. Clawson opines:

In many situations, the decision to zone or re-zone certain tracts within a general area, and to deny such classification to other tracts, is necessarily arbitrary to a considerable degree. Planning processes are simply not precise enough to prove unequivocally that one tract is suitable for development but that its neighbors are not.<sup>128</sup>

In other words, the auction device should be limited to those situations in which the planning process is unable to choose between two or more sites.

One defect from which the zoning auction model suffers to some extent is that it makes ability-to-pay the allocating mechanism. This is mitigated by the fact that the bidders may not desire to pay more for the zone change than the betterment it will confer. If this limit on bidding is voluntarily preserved, then ability to pay is not decisive. However, if bidders differ in their ability to make a zone change "pay off," in terms of future development, then it cannot be denied that the zoning auction will favor those most able to do so. But, what is a defect in the light of one set of objectives may be a virtue from another perspective. The higher the bid, the more revenue is raised.

Five mechanisms for the recovery of publicly created betterment have been advanced: recoupment; use density; reformed special assessment; conditional zoning; zoning auction. Together, they comprise the disaggregated approach to the recapture of publicly created betterment.

#### IV Legal Barriers to the Use of the Various Approaches to Betterment Recovery

A tax approach to betterment recovery, universal or partial, does not raise many interesting legal problems. It would, however, require new legislation. In this sense, adoption of a tax scheme for betterment recovery faces a large barrier. In contrast, the five mechanisms which comprise the disaggregated approach to the recovery of publicly created betterment are based on current public processes, although requiring some changes in those processes. This raises two questions: are those changes constitutional, and is new legislation needed to implement them?

#### A Excess Condemnation / Recoupment

Although there has been almost no experience in this country with excess condemnation as I have described it, there is a body of law which relates to this practice, curiously enough known as the "excess condemnation" doctrine. The term of art covers three distinct practices, which are generally referred to as the taking of remnants, the protection of public improvements, and recoupment. The last is synonymous with what I have been calling excess condemnation. Courts have generally upheld the first practice, waffled on the second, and inveighed rhetorically against the third. Objections to any of the three have been based on the requirement that condemnation be used only for a "public purpose."

Public improvement, such as street construction, may leave in its wake untouched, odd-shaped fragments of land called remnants, of such size and character as to be unusable. Courts have ruled that the taking of such property fulfills a valid public purpose, even though that land is not physically needed to accommodate the public improvement and is therefore "excess." The courts have reasoned that the taking is small in terms of harm to the owner, and the value of the taking to society (including esthetic considerations and protection of the public improvement) is large.<sup>129</sup>

Part of the rationale for taking remnants has been the protection of public improvements (or to be more precise, the prevention of uses inconsistent with the improvement). The distinction between the remnant case and the protection case appears to be the size of the taking. This factor of added acreage has caused many of the jurisdictions who have ruled on the matter to hold that condemnation for this purpose is not valid.<sup>130</sup> The reasoning follows the balancing model used in the remnant cases.

Recoupment involves the taking of property of one person and the sale or leasing of it, after a period of time and after development, to another person. It contemplates a transaction made for profit, and corresponds to the proposed excess condemnation mechanism. Several state court decisions have held or suggested that such recoupment is not a public purpose.<sup>131</sup> Typical is *Richmond v. Carneal*:<sup>132</sup>

Lot owners . . . have the right to insist that their property adjacent to the street shall not be taken from them and sold at a profit, either to pay or to reduce the expense of opening the street. Such a transaction may be good financing on the part of the city, and greatly to its benefit, but such use of private property is not a public use. Public use and public benefit are not synonymous terms.<sup>133</sup>

However, the restrictive "recoupment" case law existing on the state court level is limited to four or five cases, arguably much in need of revision. Contrary to the suggestion in *Richmond* (decided in 1921), the fact is that the great majority of jurisdictions now hold that public benefit and public use *are* synonymous terms.<sup>134</sup>

The excess condemnation model that I have outlined is somewhat analogous to urban renewal practice. In both, government takes one person's property and sells it to another. Urban renewal has been "almost universally"<sup>135</sup> held to be within the confines of the public purpose rule. The reasoning has generally been that "... the achievement of redevelopment of slum and blighted areas ... constitutes ... a public use and a public purpose, regardless of the use which may be made of the property after the redevelopment has been achieved."<sup>136</sup> The transfer of property from one individual to another is seen as merely incidental to the accomplishment of the primary purpose of the condemnation. The urban renewal case law marks the culmination of the doctrinal shift from a narrow interpretation of "public purpose" to one synonymous with public benefit.<sup>137</sup>

Thus, a modern argument for the validity of the excess condemnation mechanism would only have to justify the practice by the less stringent "public benefit" standard. Such an argument would embrace all of the policy considerations which argued for the recovery of publicly created betterment and which were discussed in the first section of this analysis. Balanced against these public benefits would be the private costs at issue. In this respect, it is again important to note that budgetary and policy considerations will help to confine excess condemnation to a limited sphere within which disturbance of private property rights will be minimized. By this test, excess condemnation would have to be upheld.

In summary, then, the excess condemnation mechanism can be justified under the modern sweep of the public purpose rule. Moreover, because the power of eminent domain is inherent in municipal authority new legislation would not be required.

#### B Use Density

I know of no cases involving the use density mechanism suggested. The device would appear to be open to legal challenge on one ground only, that of the public purpose limitation on a municipality's taxing power. Whether grounded in constitutional law or common law, it is fixed doctrine that "... taxation is a mode a raising revenue for public purposes only."<sup>138</sup> This has generally been interpreted as meaning that a use "... should be for the use and benefit of every person in the municipal corporation."<sup>139</sup>

Some early cases held that municipalities were prevented from operating businesses (such as movie theaters and coal delivery) by this doctrine.<sup>140</sup> In recent years, however, this doctrine has been considerably relaxed,<sup>141</sup> and it is quite unlikely that a use density practice could be successfully attacked in this manner. Since governmental operation of an enterprise can produce efficiencies and redistributive effects which private enterprise may not achieve, the demise of this doctrine is a welcome occurrence.

The question of whether new legislation would be necessary to legitimize this practice is more difficult to answer. If it is a municipality which is asserting its authority to undertake use density activity, one could argue that such authority is inherent in the municipal corporation or that it can be implied from other authority which has been expressly granted to the municipality (e.g. power to maintain the highway system) or that it derives from the powers of home-rule municipalities.<sup>142</sup> Each of these doctrines is imprecise, and they vary greatly from jurisdiction to jurisdiction.

#### C Special Assessment

Some of the reforms in special assessment law argued for would require legislative action (e.g., repeal of statutes limiting assessment to abutting land). These reforms do not appear to raise constitutional problems. And since the remaining aspects of the mechanism borrow from current, legal practice, the reformed special assessment mechanism would not appear to be subject to challenge in the courts.

Moreover, the reforms suggested remove the knotty constitutional difficulties which can be raised about current special assessment law. Since assessment is delayed until realization, the assessor can determine, within limits, whether a benefit has occurred and if it has not, no assessment is made. Since the reform blocks purely private initiative, no delegation problem remains. Because nothing is taken until benefit is established, the equal protection problem vanishes. And since the improvements to which the mechanism should apply are indeed substantial, there is no question that they constitute a public and not a private purpose.

#### D Conditional Zoning

As noted, conditional zoning is practiced today, though not as a mechanism for the recovery of betterment. The legal doctrine which has grown up to define its limits has two parts, "conditional zoning" doctrine and "contract zoning" doctrine, both of which at first seem to present obstacles to a widespread use of these zoning practices. Conditional zoning occurs, in legal parlance, when a zoning amendment "... permits a use of a particular property in a zoning district subject to restrictions other than those applicable to all land similarly classified."<sup>143</sup> Contract zoning occurs when a zoning amendment "... authorizes a particular use only if the landowner enters into a covenant to restrict the use in certain ways."<sup>144</sup> The essential distinctions between the two seem to be the elements of negotiation between owner and zoning authority and the establishment of a running covenant which embodies the conditions agreed to, which elements are presently only in contract zoning.

Both conditional and contract zoning have been challenged on the following grounds.



— It is contended that conditions are extracted in a bargaining process between the legislature and the landowner before a change in zone is granted and that this process must result in the compromise of proper planning standards, because of the *quid pro quo* which the planning authority presumably makes in recognition of the owner's concessions. Such a compromise borders on spot zoning, in which the public good is compromised for private gain and which is illegal. Courts often reveal this concern by stating it in a broader way. This type of zoning, they assert, results in a "piecemeal" rather than a "uniform" approach to planning, in violation of the enabling legislation.

— It is contended that conditional zoning and contract zoning may represent a procedure whereby the legislature is able to do indirectly what it could not do if done directly. The imposition of unconstitutional conditions is an example.

Other challenges are directed only against contract zoning.

— It is contended that contract zoning represents a bargaining away of the police power. If the municipality honors the covenant, as it is bound to do, it is barred from later exercising its zoning power in a way that will alter that covenant. A municipality should not be able to surrender its right, indeed, its duty, to be able to respond to changed conditions.

— It is contended that another effect of contract zoning is that the zoning authority, in effect, bypasses the hearing stage of the zoning process.

— It is contended that the various policies which lead courts to look with disfavor on running covenants apply equally well to contract zoning.<sup>145</sup>

Challenges to conditional zoning have had little success.<sup>146</sup> Those directed at contract zoning have been better received; Anderson states that while the question has been decided by only a handful of state courts, those which have decided are split on the answer.<sup>147</sup> Typical of the decisions which find contract zoning invalid is *Hartnett v. Austin*:

In exercising its zoning powers the municipality must deal with well-defined classes of uses. If each parcel of property were zoned on the basis of variables that could enter into private contracts then the whole scheme and objective of community planning and zoning would collapse . . . This is so because all genuine standards would have been eliminated from the zoning ordinance . . . Both the benefits of and the reasons for a well-ordered comprehensive zoning scheme would be eliminated.<sup>149</sup>

But conditional and contract zoning have been used for very different reasons than are being suggested here. The betterment recovery rationale and process puts the practice in an entirely new light. There are two ways to approach the case law from this new perspective.

First, one might argue that the suggested mechanism does not in fact constitute either conditional or contract zoning as presently defined in the case law. This theory would be based on an amendment to the zoning ordinance or to the enabling legislation providing that in every case where a change in zone creates substantial betterment the zoning authority may impose such conditions as will result in the recapture of that betterment. Given such an ordinance or statute, one could argue that the conditions imposed are no longer conditions required outside of the terms of the ordinance, causing a compromise of its terms. The zoning authority would not be asking the owner upon whom conditions are imposed to do anything that other owners in his same position are not asked to do.

If this conceptual skirting of existing conditional zoning doctrine proved inadequate, then one could second argue the merits of contract zoning doctrine as it applies to the suggested mechanism. Given the radically different function of that mechanism, the case law, undeveloped as it is, must be rethought as applied to this new practice. Returning, then, to the arguments outlined above, I will examine how they apply to the model:

— The problem noted by the *Hartnett* court was that contract zoning would eliminate genuine planning standards from zoning practice, changing the basis for that rezoning from considerations of the general welfare to conditions bargained for and received. While this may be true of the traditional notion of conditional and contract zoning, general welfare criteria are not traded-off in the new model. The imposition of conditions is not dependent upon the granting of the change of zone, *per se*, but upon the creation of substantial betterment. Moreover, the conditions themselves are related to the general welfare, since they are imposed in order to recover betterment, the policy for which is consistent with planning standards. The only bargaining would concern the extent to which the owner will take on duties which promote the general welfare.

— The new model may be open to the abuse of zoning authorities attempting to impose unconstitutional conditions. For this reason, the device must embody procedural safeguards, such as open hearings, as well as substantive limits. These safeguards should not be difficult to build in; zoning hearings and judicial review are procedures which already exist and could easily be incorporated into the proposed model.

However, these traditional limits may be insufficient. Should a public authority be able to tell an owner that he must put aside one-eighth of his land, on which he desires to build a home for himself, for a public use? Perhaps a homestead exemption should be built into the mechanism. Or perhaps the public authority should be required to give the owner the option of compliance with a number of alternative conditions, as well as (if these did not suit him) the choice of payment of an arbitrary increment tax, or, upon disposition of the property, a special local capital gains tax.

— The municipality can retain its power to change its mind by refraining from promising anything in bilateral contract form, instead writing the conditions into the zoning amendment, much in the manner of a unilateral contract.

— Given the proper procedural safeguards, the hearing stage will not be bypassed.

— Again, by proper use of the zoning regulations, the municipality need not rely on running covenants. Therefore the policies concerning the utility of those devices are not germane.

In summary, the suggested mechanism may well be able to avoid being construed as conditional or contract zoning, or if caught within the confines of that doctrine, it nonetheless can be argued to possess none of the five characteristics which have made some courts suspicious of the traditional practice.

Last, the suggested conditional zoning mechanism may be subject to the constitutional challenge that it constitutes a taking of property without compensation, the property at issue being the betterment itself. This is a flimsy position. The State is both giving as well as taking here. While the change in zone creates the betterment, the conditions imposed in that same transaction substantially recapture it. Of course, it might be argued that the betterment is a joint creation. Several responses are possible.

First, to the extent that the conditions imposed do not wholly recapture the betterment (and we desire this result because of the incentive problem), the betterment continues to be shared between the owner and the municipality. Since the betterment is, from the owner's perspective, at most created jointly, each creator receives a share, and there is no taking.

Second, one could contest the premise of the point creation argument, and argue that only the action of the zoning authority creates the value, thus denying that there is any private property at stake here. (Or, if there are private property rights, they have not vested in the owner.)

Third, the analogy to subdivision exactions is available. There the municipality imposes conditions on the owner as a cost of subdivision approval. The practice is acknowledged to involve property rights, but the exaction is said to be justified under the police power. Of course, to the extent that the conditional zoning mechanism imposes conditions the cost of which go beyond the costs justified under subdivision exaction law, we cannot rely on that law to buttress our case.

In summary, the conditional zoning device seems to be secure against a Fifth Amendment challenge.

It is possible, however, that new enabling legislation will be necessary to authorize this practice. The conditional and contract zoning literature contains an argument to the effect that neither of those practices is authorized by current zoning enabling legislation, which is uniformly silent on the question. One commentator has devoted considerable energy to the argument that since there is no express authorization the practices are illegal.<sup>150</sup> Other writers come to the opposite conclusion.<sup>151</sup> The courts have not addressed this question, but the approval of contract and conditional zoning by several jurisdictions could indicate a *sub silentio* resolution of this point. Moreover, several jurisdictions have upheld the practice of subdivision exaction in the absence of state statutory authorization other than the traditional zoning enabling act.<sup>152</sup> The differences between the model advanced and current practice would appear to have no bearing on this argument.

### E Selling Zone Changes

Zone changes, if sold at all today, are sold under-the-table. There is no precedent concerning the legality of over-the-counter sales. However, one legal challenge can be foreseen: since the power to zone is a police power, its use must be justified by a police power purpose. In fact, the practice of fiscal zoning, theoretically somewhat analogous to selling zone changes (in that it is used to raise revenue), has been subject to the challenge that it is outside the police power.

Fiscal zoning is a name for the behavior of those zoning authorities which base their decisions on the financial consequences to the municipality: "zoning out" by one means or another what they perceive as expensive uses, such as multi-family housing, and "zoning in" by tax incentives and overzoning good ratables, like industrial uses. The sale of zone changes could be considered a form of fiscal zoning, if not the pure case where financial considerations are the sole reason for the decision.

The law of fiscal zoning is not uniform. The zoning enabling legislation of at least three states (Colorado, Delaware and Utah) expressly state that zoning may be used to protect the tax base of the community. In these states both fiscal zoning and zone change sale would clearly be proper. In most states, the enabling act states that zoning may be used to conserve the value of property and to encourage sound community development. Here the authorization for fiscal zoning must be inferred.

It is generally held that a zoning regulation which is justified by independent general welfare standards is valid "whether or not it is adopted with a view to its effect upon tax revenue."<sup>153</sup> However, if a zoning ordinance can be justified only by reference to its revenue raising consequences, its validity is very much in doubt.<sup>154</sup> Thus the legality of zone change sales essentially depends on whether one can argue that the practice is justified on other than revenue-raising grounds.

We need to re-examine the suggestion made above that an auction represents a case in which the sole justification of the outcome is pecuniary. Two considerations alter the viewpoint of the case law just outlined. First, the sale of a zone change is not thrown open to all. Rather, planning criteria are used to determine who the bidders will be. Therefore, there are independent general welfare standards on which the decision is based. Second, above and beyond the particulars of the sale at issue, there are more general, public welfare standards which justify the sale mechanism itself. These standards or policies have been outlined; they include the goals of (1) assuring adequate worsement compensation, (2) assuring equity, (3) minimizing planning distortion, (4) preventing corruption in the zoning process, (5) assuring public acceptance of public land use planning, and (6) raising revenues. The sixth and perhaps the first goals are of no use for the purpose of this argument. The others remain and constitute a strong justification for the practice.

As to the need for additional legislation, the debate noted with respect to conditional zoning would seem to apply equally to this device.

Four mechanisms for the recovery of publicly created betterment, excess condemnation, use-density, conditional zoning, and the sale of zone changes, are arguably available to public authorities without a change in current legislation. If various of the constitutional and statutory arguments presented are not accepted, some legislative change would be necessary. A fifth recovery mechanism, special assessment, may require new legislation, depending upon variations in existing state and local law.

## V Evaluation

The case for betterment recovery has been made, and three approaches to recovery have been advanced: the taxation of all betterment, the taxation of publicly-created betterment, and the use of a disaggregated group of techniques. How do these approaches compare when evaluated in the light of the impediments to betterment recovery-political feasibility, administrative cost, and the incentive problem?

### 1 *The Political Milieu*

Betterment recovery would not be necessary to accomplish the objectives identified if we were willing to tax ourselves by other means so as to remove inequities in windfall gains and finance adequate worsement compensation. The optimal, most coherent scheme would perhaps be to put aside the current capital gains tax and use a cleaned-up income tax as the exclusive means of generating public revenue and paying for public goods. In this sense, betterment recovery is a type of second-best solution. In more practical terms, however, betterment recovery has its advantages. Certainly programs of betterment recovery would arouse less political opposition than would a program based on a wholesale revision of our tax structure. Even the two tax mechanisms proposed for re-

covering betterment — the tax on all betterment and the tax on publicly-created betterment only — would provoke less opposition than such a sweeping change. But of the three approaches to betterment recovery identified, the most advantageous in this respect is the disaggregated approach. Whereas any new tax scheme, no matter how limited, would require new legislation, the five mechanisms described can be used within the context of present law, or with relatively minor modifications of that law.

Although these non-tax approaches would not require significant new legislation, implementing them will require the support of various actors in the governmental process. Government administration should be enthusiastic about two of the devices, use density and conditional zoning. Use density practice would enlarge the public fisc, enhance the image of public enterprise, and give more power (to negotiate for the construction, sale and/or lease, or auction of public rights) to the authorized official departments. Conditional zoning would similarly increase the scope and amount of power wielded by the government entity involved, the zoning authority. Thus political incentives exist for the adoption of these mechanisms.

Excess condemnation would appear to offer the same incentives. However, this device presents special considerations. Excess condemnation makes sense only in a limited geo-political context — so-called finger or cluster development. Finger development occurs when development takes place along radial lines from a developed central point. Developments along the New York subway system in the 1890's, the New York commuter train system in the 1940's, and perhaps the Metroliner lines in this decade, are illustrations. Cluster development occurs when major infrastructure investment is located at one point, such as an airport or a new town.

Both finger and cluster development are often funded at high levels of government. Yet despite this widespread investment, betterment will often fall at very discrete points, e.g. an interchange or access point, where the investment and the betterment are large and concentrated. The inequity of the recovery of this betterment via local authorities is evident: the cost of the geographically widespread investment is no doubt borne by many; why then should a few benefit? If money were recaptured locally, it could only be used to offset locally created worsement. Moreover, a different sort of corruption and planning distortion might emerge, with local officials trying to influence decision-makers to better local interests. In short, excess condemnation must be practiced by a level of government which could spread the benefits recovered over an area which would encompass a substantial group of people, ideally those who paid for the improvement.

This does not mean that the political incentives noted do not apply to excess condemnation. It does mean that the political incentives are likely to have less impact, for the

simple reason that a governmental level does not exist which could respond to them. Instead, that response will be sporadic, corresponding to the ad hoc governmental units established for purposes of metropolitan-wide or larger public improvement.

The remaining two of the five partial mechanisms, zoning sales and special assessment, create only limited incentives for their use. Zoning sales make sense only when two or more lots, and preferably more than two, are available on which a particular use should be placed. That situation would no doubt occur more often if planning criteria were applied to a relatively large area, as opposed to the area of a typical municipality. Within such a municipality, it is unlikely that there will exist three or four locations where a shopping center could equally well be located.

Neither is the reformed special assessment mechanism limited to local application. When the benefits of an improvement spread beyond the boundaries of a locality, the need for non-local administration often arises. A special assessment district, whose authority crosses local jurisdictions, would be required.

To the extent that zoning auctions and special assessment practice can be limited to the boundaries of a locality, the incentives noted apply. But because the zoning and special assessment powers are currently wielded by municipalities, any transfer of control to an extra-municipal administration is liable to encounter stiff political resistance. Moreover, a member of a zoning authority will lose much of his discretionary power when he picks up the gavel of a zoning auctioneer.

This analysis does not doom the disaggregated approach to betterment recovery. Three of the five devices put forward, conditional zoning, use-density, and excess condemnation, embody incentives for their application. More important, the five devices are in no sense mutually dependent or closed to compromise. If, for example, the arguments for betterment recovery are not sufficient to persuade local officials to establish an extra-municipal assessment district, assessment might be limited to land within the locality, if that made sense. If zoning auctions on a regional or sub-regional basis are not politically feasible, a betterment recovery scheme can proceed without them.

In summary, it appears that the disaggregated approach to betterment recovery would indeed be more politically feasible than a legislated tax approach. On the other hand, the possibility of local experimentation with betterment recovery by taxation should not be overlooked. Municipalities may be sufficiently hard-pressed financially to override the general opposition to new tax legislation.

## 2 *Administrative Costs*

The five mechanisms which together constitute the disaggregated approach do entail administrative costs. These costs would probably be smaller than those needed to administer a tax on publicly created betterment, but surely much larger than those which a universal tax would entail.

## 3 *The Incentive Problem*

The problem of discouraging private initiative is inherent in a betterment recovery scheme, no matter what its particulars. However, it may be that a universal tax would present a larger problem in this respect than would the other two approaches.<sup>155</sup>

Awareness of the problem is more than half the solution. The problem, after all, exists in all forms of taxation. If we design recovery mechanisms which attempt to build in a substantial amount of gain to the developer, then we can proceed to monitor developments (for instance, whether land is being withheld from the market) and make changes where necessary.

Incentive can be built into betterment recovery devices by regulating the percentage of betterment recovered. It may well be that the tax approaches are more adaptable in this regard than the five partial devices. Another means of building in incentive is by the use of exemptions.

One blanket exemption has already been suggested, albeit in a footnote.<sup>156</sup> Non-profit developers represent a special class of user which should not be subject to any type of betterment recovery. This is particularly true in the case of non-profit residential developers where cost increases resulting from betterment recovery may create exclusionary conditions of the sort now under constitutional attack in the courts.<sup>157</sup> Moreover, non-profit developers are quite different from for-profit developers in their disposition of the betterment they currently receive. For-profit developers pocket the betterment as a windfall; non-profit developers use that money to offset costs incurred, thereby passing the betterment along to the ultimate user. Because of the nature of a non-profit enterprise, the betterment is put to a public use. For example, a non-profit developer who is building subsidized housing will use the betterment it takes in to reduce the rent of the units it is constructing. This in turn decreases the amount of the subsidy (paid by the taxpayer). In this way, the non-profit developer itself acts as a betterment recovery mechanism.

In the absence of a firm empirical base, the difference proposed in this article between the recovery of all betterment and recovery of only publicly-created betterment must rest on several tentative theoretical distinctions and on speculations concerning administrative costs and political feasibility. The difference between the tax approach to betterment recovery and the disaggregated approach rests on similar grounds.

If this is partly a plea for empirical research in the area, it is also a plea for experimentation by government. Tax approaches to betterment recovery can be implemented on any level of government. As we have seen, the disaggregated approach can be partly implemented on a local level, as well as on an *ad hoc* extra-municipal one. These various governmental entities could serve as laboratories for experimentation in this type of public enterprise. It would be an experiment which, unlike so many others, promises to pay for itself in cash and in kind.

The case for betterment recovery has been outlined. Here, I want to make two additional points.

First, it appears that this country is on the verge of a substantial if not massive New Town movement. Frustrated in our attempts to grapple with the problems of the old central cities, we seem anxious to shift our attention to new places and new opportunities. Reston and Columbia were the first steps in that direction. The New Communities Development Act of 1968<sup>158</sup> represents the response of the federal government, in the form of substantial underwriting of the cost to private developers.

New Towns may be to the 1970's what urban renewal was to the 1950's-1960's — a “partnership of public and private enterprise” that begins with high hopes but ends with the public bearing the cost and the private developer and the affluent consumer reaping the benefits. The concept of betterment recovery offers public enterprise the possibility of building new towns where, as in the British experience, the surplus subsidizes low- and moderate-income housing and various public amenities.

Second, it has become a cliché that the fragmented nature of municipal government in this country seriously retards genuine and effective land use planning. Instead, we have fiscal and exclusionary zoning. The betterment recovery concept may provide an incentive for centralization of land use decision-making. If, as suggested, betterment recovery via the disaggregated approach is most effective on the extra-municipal level, perhaps the opportunity to recapture and share in substantial new revenue will act as a carrot for this kind of centralization.

Tentative steps toward regional land-use planning are now being taken. Much of this is on an *ad hoc* basis, e.g., regional pollution agencies, regional water basin agencies. Unique for its more general jurisdiction are the so-called A-95 area-wide review agencies. Established pursuant to the Planned Metropolitan Development Act of 1970,<sup>159</sup> these public authorities must review and make recommendations on all applications for federal loans or grants

to assist in projects that have metropolitan impact, e.g., airports, highways, regional recreation facilities, water supply.<sup>160</sup> In some areas of the country, these bodies have gone beyond their statutorily defined minimal duties to attempt to resolve regional problems such as residential segregation.<sup>161</sup> If one of these public authorities should obtain the consent of its constituent municipalities with respect to the implementation of a plan of betterment recovery, there would commence an institutional as well as a financial and planning experiment of the first order of importance.

- 1 These are British terms. They and other information concerning British law and practice are derived from the author's personal knowledge obtained in course of study in England.
- 2 W. Alonso, *Location and Land Use*, 111-116 (1965).
- 3 More complex relationships are only now coming to light. Aaron points, for example, to a link between performance by students on reading tests and home values; that is, the value of homes fluctuated with the reputation of neighborhood schools. H. Aaron, *Shelter and Subsidies*, 6 (1972).
- 4 Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960).
- 5 397 Pa. 463, 156 A.2d 334 (S.Ct. of Pa., 1959).
- 6 *Restatement of Torts*, Section 822 (1939).
- 7 *Id.*, at Section 826.
- 8 G. Calabresi, *The Costs of Accidents*, 135 (1970)
- 9 *Id.*
- 10 195 N.E. 2d 341 (Sup. Jud. Ct. of Mass., 1964).
- 11 *Id.*, at 345.
- 12 *Id.*
- 13 Michelman, *Property, Utility, and Fairness*, 80 Harv. L.R. 1165, 1183-1201 (1967).
- 14 Quoted in Fuller and Braucher, *Basic Contract Law* (2nd Edition), 151.
- 15 *Restatement of Restitution*, Section 112 (1937).
- 16 Institute of Economic Affairs, Occasional Paper #28, *Private Capital for New Towns*.
- 17 The 1967 Census indicated that the assessment-to-sales ratio for all types of land was 31 per cent. 1967 *Census of Governments*, Volume II (6) 42.
- 18 U.S. Advisory Commission on Intergovernmental Relations, *Tax Overlapping in the United States*, 88 (1967).
- 19 Shannon, *Conflict Between State Assessment Law and Local Assessment Practice*, in R. Lindholm (ed.), *Property Taxation USA* (1969), 39.
- 20 Section 1201-1202 of the 1954 Internal Revenue Code. Moreover, the presence of various tax minimization devices in the income tax structure means that individuals will rarely be taxed at rates which approach 70%.
- 21 Section 1014 of the 1954 Code. Of course, that stepped-up basis is used for estate tax purposes. However, the estate tax has its own set of tax minimization devices.
- 22 E. McQuillan, 14 *Municipal Corporations* (1970 revision), Sections 38.01-02.
- 23 *Id.*, Section 38.01.
- 24 *Id.*, Section 38.11.
- 25 *Id.*
- 26 *Id.*
- 27 Empirical knowledge of assessment practice is rather meager, as it is shaped to a large extent by municipal ordinance.
- 28 McQuillan, *supra*, note 22, Section 38.134.
- 29 R. Cushman, *Excess Condemnation* 18 (1917).
- 30 New York Tax Commission, *Special Assessment Procedure* 33-34 (1929).
- 31 It has been said that in the first forty years of zoning litigation, there was only one intelligent opinion, Judge Hall's dissent in *Vickers v. Township of Gloucester*, 181 A2d 129 (N.J., 1962). Although my reading has been limited, the special assessment case law appears to be similarly unenlightening.
- 32 Antieau, *Municipal Corporation Law*, Section 21.11.
- 33 McQuillan, *supra*, note 22, Section 38.11.
- 34 R. Anderson, 1 *American Law of Zoning*, Section 5.05 (1968).
- 35 McQuillan, *supra*, note 22, Section 38.11.
- 36 Nichols, *How Not to Contest Special Assessments in California or You Can't Beat City Hall*. 17 Stan. L.R.247 (1964).
- 37 McQuillan, *supra*, note 22, Section 38.03.
- 38 See, e.g., *Hadnot v. City of Prattville*, 309 F. Supp. 967 (M.D. Ala., 1970), and *Citizens for Underground Equality v. City of Seattle*, 492 P.2d 1071 (Ct. of App. of Wash., 1972).
- 39 Nichols, *Eminent Domain*, Section 3.24 (1972).
- 40 *Id.*, Section 7.222(4).
- 41 *Id.*
- 42 Tate, *Legal Criteria of Damages and Benefits*, 31 La. L.R. 431, 437 (1971).
- 43 Reps, *Control of Land Subdivision by Municipal Planning Boards*, 40 Cornell L.Q. 258 (1955).
- 44 *Id.*, at 268. See also, Mary Brooks *Mandatory Dedication of Land or Fees-in-Lieu of Land for Parks and Schools*, American Society of Planning Advisory Service Report Number 266 (February 1971).
- 46 See, e.g., Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents through Subdivision Exactions*, 73 Yale L.J. 1119 (1964).
- 47 See the debate between Reps and Smith, *Control of Urban Land Subdivision*, 14 Syracuse L.R. 405 (1963) and Heyman and Gilhool, *supra*, note 46, at 1130-1141. It is unclear to what extent these larger costs are exacted today. Heyman and Gilhool suggest the case law is developing such that only conventional exactions are valid.
- 48 See, e.g., *National Land Investment Co. v. Kohn*, 419 Pa. 509, 215 A.2d 597 (Pa. 1965). *Oakwood at Madison v. Township of Madison*, 117 N.J. Super. 11 (N.J. Super. Ct., 1971), and *Kennedy Park v. City of Lackawana*, 436 F.2d 115 (2nd Cir., 1970).
- 49 See text accompanying note 42.
- 50 See, e.g., *Chicago, B&Q R.R. v. Chicago*, 166 US 226 (1897).
- 51 Bosselman, et. al., *New Approaches to Compensation for Residential Takings*, National Cooperative Highway Research Report 107, 3 (1970). (Hereafter, National Coop).
- 52 *Id.*
- 53 *Id.*
- 54 *Id.*, at 4.
- 55 See, e.g. *Hearings on Real Property Acquisition Practices and Adequacy of Compensation in Federal and Federally Assisted Programs, before the Select Subcommittee on Real Property Acquisition of the House Committee on Public Works*, 88th Cong, 2d Sess. (1964), *United States v. General Motors Corp.*, 323 US 373, 382 (1945), and *City of Newark v. Cook*, 99 N.J.Eq. 527, 538, 133 A. 875, 879, (Ch. 1926).
- 56 See text accompanying notes 72-76.
- 57 364 US 339 (1960).
- 58 314 US 160 (1941).
- 59 394 US 618 (1969).
- 60 345 US 60 (1917).
- 61 334 US 1 (1948).
- 62 387 US 369 (1967).
- 63 42 USC Section 1455.
- 64 84. Stat. 1894: 42 USC 1415, 2473, 3307, 4601, 4602, 4621-38, 4651-55; 49 USC 1606.
- 65 Hartman, *Illusory Promises and No Relief*, 57 Va. L.R. 756 (1971).
- 66 In L. Duhl (ed.) *The Urban Condition* (1963), 151-171.
- 67 Bingham, *Fair Market Value, "Just Compensation," and the Constitution*, 24 Vand. L.R. 63, 69 (1970).
- 68 W. Rokes, *An Analysis of Property Valuation System under Eminent Domain* 0 (1961).
- 69 Bingham, *supra*, note 67, at 76.
- 70 *Id.*, at 77.

- 71 Nichols, *supra*, note 39, 6.38.
- 72 Reich, *The New Property*, 73 Yale L.J. 733, 771 (1964).
- 73 Quoted in Bingham, *supra*, note 67, at 67.
- 74 Despite the force of the arguments in the text accompanying notes 50-72 and despite the unanimity of the literature on the conclusion that the present compensation practices do not provide adequate compensation, one occasionally hears in administrative circles the feeling expressed that compensation practices are too generous! This opinion invariably focuses on the role of the jury in eminent domain trials; the jury supposedly is sympathetic to the injured property owner. This view of the matter fails to consider the fact that the overwhelming number of worsened property owners never reach a jury, either because the legal doctrine makes a cause of action impossible or because they cannot afford the money and time it takes to go to trial. This bureaucratic pique is perhaps explainable in terms of the constraints of the bureaucrats. See text accompanying note 90.
- 75 National Coop, 12.
- 76 Bingham, *supra*, note 67, at 79.
- 77 Michelman, *supra*, note 13, at 1255.
- 78 *Id.*, at 1247.
- 79 *Id.*
- 80 *Id.*, at 1245.
- 81 A. Bickel, *The Least Dangerous Branch* (1962)
- 82 Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149. (1971).
- 83 *Id.*, at 156.
- 84 *Id.*, at 161.
- 85 *Id.*, at 167.
- 86 See, generally, Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking?* 57 Minn. L.R. 1 (1972).
- 87 See text following note 48.
- 88 Peter Self, *Cities in Flood*, 161 (1957).
- 89 See text preceding footnote 49.
- 90 Sax, *supra*, note 82, at 160.
- 91 Reaves, *Land is Prize in Battle for Control of Suburbs*, New York Times, July 1, 1971, 39.
- 92 Pollack, *The Supreme Court of Connecticut, 1966-1967*, 41 Conn. B.J. 626, 657 (1967).
- 93 Clawson, *Should Your Town Sell Zoning and Rezoning?* 5 Nation's Cities 19 (1967).
- 94 N.J. State Comm. on Investigations, *Transcript of Public Hearings into the Influence of Organized Crime and Corruption in the State of New Jersey*, Sept. 19 and 20, 1972, 20-22.
- 95 See, e.g., Bowman and Quarles, *National Land Use Policy* (1972), a report compiled at the request of Senator Jackson of the Senate Committee on Interior and Insular Affairs, 92nd Cong., 2d Session. For the classic statement of the case, see Self, *supra*, note 88.
- 96 Self, *supra*, note 88, at 160.
- 97 Those "costs" are set forth in the text accompanying notes 48 to 50.
- 98 See, e.g., H. George, *Progress and Poverty* (1879)
- 99 The National Commission on Urban Problems (Douglas Commission) *Building the American City* 359-6 (1969). (hereafter, The Douglas Commission).
- 100 For a typically light-hearted effort, see Hagman *The Single Tax and Land Use Planning*, 12 UCLA L.R. 762 (1965).
- 101 The Douglas Commission, at 396.
- 102 *Id.*
- 103 *Id.*, at 397.
- 104 See text following note 48.
- 105 A national commission, the Uthwatt Commission, reported in 1942, on the subject of compensation and betterment. Its specific recommendations were modified by the Labour Government but its general analysis was the basis of the determination to recover betterment embodied in the 1947 legislation.
- 106 Hall, *The Land Values Problem and its Solution*, in Hall (ed.) *Colloquium on Land Values* (1965), at xiii.
- 107 *Id.*
- 108 See, *supra*, note 1. Much of the following discussion is attributable to this source.
- 109 See text accompanying notes 111-112.
- 110 *Id.*
- 111 Self, *supra*, note 88, at 95.
- 112 Cushman, *supra*, note 29, at 134.
- 113 See text accompanying notes 129-137.
- 114 For example, the apartment complex over the approach to the George Washington Bridge in New York and the office block over the Massachusetts Thoroughway just past the Newton exchange in the direction of Boston.
- 115 McQuillan, *supra*, note 22, Section 38.138.
- 116 Research on the Dallas Expressway found that land value increment formed a discernable and consistent pattern which it described as "bands." William Adkins, *Effects of the Dallas Central Expressway on Land Values and Land Use* (1957).
- 117 See, the cases compiled in Heyman and Gilhool, *supra*, note 46, at 1134-1146.
- 118 The "cost" of betterment recovery would be passed on to the ultimate user if coercive forces dominated the land market. The British experience suggests that a betterment tax will be passed on to some extent. There is only one situation, however, in which the bulk of that cost is certain to be passed on, that is the case of non-profit developers. For this reason, I urge that non-profit developers be exempt from betterment recovery. See text accompanying note 151.
- 119 Heyman and Gilhool recognize this problem but attempt to minimize its importance; cf., Heyman and Gilhool, *supra*, note 46, at 1144. In the light of constitutional and demographic developments since then, (1964), the point would appear to be important, indeed. See, *supra*, note 48.
- 120 See generally, Mary Brooks, *Bonus Provisions in Central City Areas*, American Society of Planning Officials Planning Advisory Service Report Number 257 (May, 1970).
- 121 *Bonus or Incentive Zoning-Legal Implications*, 21 Syr L.R. 895 (1970).
- 122 *Id.*
- 123 Costonis, *The Chicago Plan: Incentive Zoning for the Preservation of Urban Landmarks*, 85 Harv. L.R. 574 (1972).
- 124 Clawson, *supra*, note 93.
- 125 *Id.*
- 126 *Id.*
- 127 Self, *supra*, note 86, at 152.
- 128 Clawson, *supra*, note 93.
- 129 Nichols, *supra*, note 39., Section 7.5122[1]
- 130 *Id.*, Section 7.5122[2]. See also, Mimbbs, *Eminent Domain-The Meaning of the Term "Public Use"-Its Effect on Excess Condemnation* 18 Mercer L.R. 275,280 (1966), and Annot. 6 #ALR3d #297 (1966).
- 131 The major cases are - *Cincinnati v. Verter*, 33 F2d 262 (6th Cir. 1929), *aff'd on other grounds* 281 US 439, *Opinion of the Justices*, 204 Mass. 616, (1910), and *Richmond v. Carneal*, 129 Va. 388 (1911). Recent comment on the practice is found in *People v. Superior Court*, 68 Cal. 2d 206 (1968) and *State Highway Dept. v. 9.88 Acres of Land*, 253 A2d 509 (1968).
- 132 129 Va. 388 (1921).

- 133 *Id.*, at 393.
- 134 Nichols, *supra*, note 39, Section 7.2.
- 135 *Id.*, Section 7.51561.
- 136 *Zurn v. City of Chicago*, 389 Ill. 114 at 129, 59 NE2d 18 (1945).
- 137 Nichols, *supra*, note 39, Section 7.51561.
- 138 Antieau, *Municipal Corporation Law*. Section 21.11.
- 139 *Id.*
- 140 *See, e.g., Toebe v. City of Munising*, 282 Mich. 1 (1937), and *John Wright Associates v. City of Red Wing*, 254 Minn. Rpt. 1, 93 NW2d #660 (1958).
- 141 Antieau, *supra*, note 135, Section 21.11.
- 142 McQuillan, *supra*, note 22, Sections 10.11, 10.12 and 10.13.
- 143 Anderson, *supra*, note 34, Section 8.20.
- 144 *Id.*, Section 8.21.
- 145 These arguments can be found in Strine, *The Use of Conditions in Land Use Controls*, 67 Dick.L.R. 109 (1965); in Shapiro, *The Case for Conditional Zoning*, 41 Temple L.Q. 267 (1968); and in *Zoning Amendments and Variances Subject to Conditions*, 12 Syr.L.R. 230 (1960).
- 146 Anderson, *supra*, note 34, Section 8.20.
- 147 *Id.*, Section 8.21.
- 148 93 So.2d 86 (Fla., 1956).
- 149 *Id.*, at 89.
- 150 Crolly, *The Rezoning of Properties Conditioned on Agreements With Property Owners*, N.Y.L.J., March 8, 9, 10, 1961.
- 151 *The Use of Conditions in Land Use Controls*, 67 Dick. L.R. 109 (1965), 116-119; *See also, Bonus or Incentive Zoning, supra*, note 121, at 900-903.
- 152 *See, e.g., Jenad, Inc. v. Village of Scarsdale*, 271 N.Y.S. 2d 955 (Ct. of App. of N.Y., 1966) and *Jordon v. Village of Menomonee Falls*, 28 Wis.2d 608, 137 NW2d 442 (1965).
- 153 Anderson, *supra*, note 34, Section 7.31.
- 154 *Id.*
- 155 *See* text following note 103.
- 156 *See, supra*, note 118.
- 157 *See, supra*, note 48.
- 158 42 U.S.C. § 3901-3915.
- 159 42 U.S.C. § 3331-3339.
- 160 *See generally, Haar, Metropolis and Washington: A New Federalism?* 1970 Utah L.R. 511.
- 161 The Dayton, Ohio authority has been particularly active concerning the problem of residential segregation (economic and racial) on a metropolitan-wide basis. *See, e.g., Bertsch and Shafor, A Regional Housing Plan: The Miami Valley [Dayton] Regional Planning Commission Experience*, 1 Planners' Notebook 1 (April, 1971).





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